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ARKANSAS CODE OF 1987 ANNOTATED



VOLUME 14B

1999 Replacement

TITLE 16: PRACTICE, PROCEDURE, AND COURTS (CHAPTERS 18-54)

Prepared by the Editorial Staff of the Publisher

Under the Direction and Supervision of the
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Sources

This volume contains legislation enacted by the Arkansas General Assembly through the 1999 Regular Session. Annotations are to the following sources:

Arkansas Advance Reports through 337 Ark. 228 and 66 Ark. App. 108.

Federal Supplement through 35 F. Supp. 58.

Federal Reporter 3rd Series through Volume 168, p. 1310.

United States Supreme Court Reports, Lawyers' Edition, 2nd Series through Volume 140, p. 969.

Bankruptcy Reporter through Volume 230, p. 891.

Arkansas Law Notes through the 1998 Edition.

Arkansas Law Review through Volume 51, p. 850.

University of Arkansas at Little Rock Law Journal through Volume 20, p. 1206.

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User's Guide

Many of the Arkansas Code's research aids, as well as its organization and other features, are described in the User's Guide, which appears near the beginning of Volume 1 of the Code.

TITLE 16

PRACTICE, PROCEDURE, AND COURTS

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- 16-18-109. Election and term in cities of the first class.
- 16-18-110. [Repealed.]
- 16-18-111. Establishment of city court in lieu of municipal court in certain cities of the first class.
- 16-18-112. Schedule of fees or monthly allowance for judge of police court, city court, or mayor's court — Designation of substitute judge of city court.

Effective Dates. Acts 1995, No. 1032, § 13: July 1, 1995. Emergency clause provided: "It is hereby found and determined by the Eightieth General Assembly, that in order for the Department of Health to become more efficient in accounting and budgetary practices due to the transfer of the Bureau of Alcohol and Drug Abuse

Prevention, changes in various funds are needed; and that the provisions of this Act provide such changes. Therefore, an emergency is hereby declared to exist and this Act being necessary for the immediate preservation of the public peace, health and safety shall be in full force and effect from and after July 1, 1995."

RESEARCH REFERENCES

Ark. L. Rev. Minimum Standards of Judicial Administration—Arkansas, 5 **Arkansas' Judiciary: Its History and Structure**, 18 Ark. L. Rev. 152.
Ark. L. Rev. 15.

16-18-101. Jurisdiction — Incapacity of judge.

(a) The police judge shall preside over the police court, shall perform the duties of judge thereof, and shall have jurisdiction over all cases of misdemeanor arising under this act and all ordinances passed by the city council in pursuance thereof.

(b) In the case of the disability or unavoidable absence of the police judge, it shall be the duty of the council of a city of the first class to secure a justice of the peace of the township in which the city is situated to act as police judge during the absence or disability. The justice of the peace so appointed shall have power to act as judge during the time of absence or disability and shall receive such compensation for performing the police judge's duties as may have been previously agreed upon.

History. Acts 1995, No. 1245, § 1.

Publisher's Notes. Former § 16-18-101, concerning police court jurisdiction and the unavailability of the police judge, was repealed by Acts 1995, No. 175, § 3. The section was derived from Acts 1875, No. 1, § 54, p. 1; C. & M. Dig., § 7728; Pope's Dig., § 9924; A.S.A. 1947, § 22-801.

Acts 1995, No. 1245 became law without the Governor's signature.

Meaning of "this act". Acts 1995, No. 1245, codified as §§ 16-18-101 — 16-18-105, 16-18-107 — 16-18-109, 16-18-112, 26-52-301.

Acts 1875, No. 1, codified as §§ 14-37-101 — 14-37-105, 14-37-107, 14-37-108, 14-38-101, 14-38-103 — 14-38-108, 14-38-114, 14-40-601 — 14-40-606, 14-40-1801 — 14-40-1803, 14-42-101, 14-42-102, 14-

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CASE NOTES

Cited: Lovell v. State, 283 Ark. 425, 678 S.W.2d 318 (1984), (decision under prior law).

16-18-102. Time for conducting court — Procedure before court — Compelling attendance.

The police court shall always be open for the dispatch of business but may adjourn from day to day or from time to time. The mode in which cases shall be brought before the court shall be fixed by an ordinance of the city council or by a rule of the police court, not in conflict with the laws of this state. The police court shall have power to compel the attendance of witnesses and parties.

History. Acts 1995, No. 1245, § 2.

No. 1, § 56, p. 1; C. & M. Dig., § 7729; Pope's Dig., § 9925; A.S.A. 1947, § 22-802.

Publisher's Notes. Former § 16-18-102, concerning police court procedure, was repealed by Acts 1995, No. 175, § 3. The section was derived from Acts 1875,

Acts 1995, No. 1245 became law without the Governor's signature.

16-18-103. Rules of court — Clerk.

(a) The police judge shall adopt such rules of practice and procedure as will give parties a proper statement of any charge against them and an opportunity of being heard but shall, at the same time, dispatch the business with convenient speed. All rules of the court shall be written or printed and posted in the room in which the police court holds its sittings.

(b) The police judge shall be clerk of his own court and shall have the care and custody of all papers, books, and records belonging to the court.

History. Acts 1995, No. 1245, § 3.

Publisher's Notes. Former § 16-18-103, concerning police court rules and the police court clerk, was repealed by Acts 1995, No. 175, § 3. The section was de-

rived from Acts 1875, No. 1, § 56, p. 1; C. & M. Dig., § 7730; Pope's Dig., § 9926; A.S.A. 1947, § 22-803.

Acts 1995, No. 1245 became law without the Governor's signature.

RESEARCH REFERENCES

Ark. L. Rev. Judicial Regulation of Procedure, 9 Ark. L. Rev. 146.

16-18-104. Monthly report to council — Payment of funds into city treasury.

On the first day of every month or within three (3) days thereafter, the judge of the police court shall account, under oath, for all penalties, fines, and forfeitures imposed by the court, in city cases, to the city council and shall pay into the city treasury the amount thus received by him.

History. Acts 1995, No. 1245, § 4.

Publisher's Notes. Former § 16-18-104, concerning the police court judge's monthly report to city council and payment of funds into the city treasury, was repealed by Acts 1995, No. 175, § 3. The

section was derived from Acts 1875, No. 1, § 57, p. 1; C. & M. Dig., § 7731; Pope's Dig., § 9927; A.S.A. 1947, § 22-804.

Acts 1995, No. 1245 became law without the Governor's signature.

16-18-105. Fees of witnesses.

Witnesses in the police court shall be allowed the same fees in cases arising from a violation of an ordinance as are allowed in similar cases before a justice of the peace, and the fees shall be paid in the same manner.

History. Acts 1995, No. 1245, § 5.

Publisher's Notes. Former § 16-18-105, concerning police court fees, was repealed by Acts 1995, No. 175, § 3. The section was derived from Acts 1875, No. 1,

§ 58, p. 1; C. & M. Dig., § 7732; Pope's Dig., § 9928; A.S.A. 1947, § 22-805.

Acts 1995, No. 1245 became law without the Governor's signature.

16-18-106. [Repealed.]

Publisher's Notes. This section, concerning disposition of additional court costs, was repealed by Acts 1997, No. 788,

§ 32 and No. 1341, § 31. The section was derived from Acts 1995, No. 1245, § 6.

16-18-107. Appeals.

Any final conviction or sentence of the police court may be examined into by the circuit court of the county, in the manner provided by law regulating appeals from justices of the peace, and proceedings may be stayed on such terms as may be reasonable. The police judge shall, upon appeal, return all matters of record or on file touching the proceedings, or a transcript thereof, and any facts which may have been noted by the judge, or certified in the nature of a bill of exceptions at the time of trial, which it shall be the duty of the judge, on the request of the party, to do. On return, the circuit court shall make such order as right and justice may require and may either discharge the party, set aside the conviction, or order a new trial. However, no conviction or sentence shall be set aside or disregarded for want of any technical averment that any matter or thing is within its jurisdiction.

History. Acts 1995, No. 1245, § 7.

Publisher's Notes. Former § 16-18-107, concerning appeals from police court, was repealed by Acts 1995, No. 175, § 3. The section was derived from Acts 1875,

No. 1, § 59, p. 1; C. & M. Dig., § 7733; Pope's Dig., § 9929; A.S.A. 1947, § 22-806.

Acts 1995, No. 1245 became law without the Governor's signature.

RESEARCH REFERENCES

UALR L.J. Survey, Criminal Procedure, 14 UALR L.J. 335.

CASE NOTES**Jurisdiction.**

The chancery court has no jurisdiction over police court's use of bail money; rather than appealing to the circuit court the police court's decision foreclosing on

and attaching the disputed funds, as he should have done, plaintiff improperly filed suit in chancery court attempting to countermand the police court's order by enjoining the city's use of plaintiff's funds.

Skelton v. City of Atkins, 317 Ark. 28, 875 S.W.2d 504 (1994), (decision under prior law).

16-18-108. Seal — Court of record.

Every police court shall have a seal and shall be deemed a court of record. The seal shall be provided by the city council, with the name of the state in the center and the words "police court" around the margin.

History. Acts 1995, No. 1245, § 8.

§ 60, p. 1; C. & M. Dig., § 7727; Pope's Dig., § 9923; A.S.A. 1947, § 22-807.

Publisher's Notes. Former § 16-18-108, concerning the police court seal, was repealed by Acts 1995, No. 175, § 3. The section was derived from Acts 1875, No. 1,

Acts 1995, No. 1245 became law without the Governor's signature.

16-18-109. Election and term in cities of the first class.

The police judges of cities of the first class as provided by law shall be elected every four (4) years and shall serve a term of four (4) years and until a successor is elected and qualified as such.

History. Acts 1995, No. 1245, § 9.

section was derived from Acts 1953, No. 381, § 1; A.S.A. 1947, § 22-810.

Publisher's Notes. Former § 16-18-109, concerning election and term of police court judges in first-class cities, was repealed by Acts 1995, No. 175, § 3. The

Acts 1995, No. 1245 became law without the Governor's signature.

CASE NOTES

Cited: O'Neal v. State, 321 Ark. 626, 907 S.W.2d 116 (1995), (decision under prior law).

16-18-110. [Repealed.]

Publisher's Notes. This section, concerning police courts in cities of the second class created by city council, was repealed

by Acts 1995, No. 175, § 3. The section was derived from Acts 1949, No. 215, §§ 1, 2; A.S.A. 1947, §§ 22-808, 22-809.

16-18-111. Establishment of city court in lieu of municipal court in certain cities of the first class.

(a) Any city of the first class which has a population of five thousand (5,000) or less as established by a special census or the federal decennial census may, by act of its governing body, provide for the establishment of a city court in lieu of a municipal court. All fines and penalties assessed by the court shall be paid into the city's general fund.

(b) Upon attaining a population in excess of five thousand (5,000), the governing body of the city shall adopt a resolution or ordinance providing for the creation of a municipal court and the election of the judge thereof at the general election next following the adoption of the resolution or ordinance providing for the establishment of the court.

(c) It is not the intention of this section to repeal any of the laws of this state concerning the establishment of municipal courts, but it is the intention of this section to provide an alternative procedure whereby a city of limited size may defer the establishment of a municipal court until its population will support the establishment of a municipal court.

History. Acts 1967, No. 98, § 1; A.S.A. 1947, § 22-811; Acts 1995, No. 175, § 1.

Amendments. The 1995 amendment rewrote this section.

CASE NOTES

ANALYSIS

De facto court.

Publication of ordinance.

De Facto Court.

When a court is organized under color of law, that is, when its creation is authorized by law but the proceedings creating it are irregular or defective, it is a de facto court, and its judgments and proceedings are not open to collateral attack. *Landthrip v. City of Beebe*, 268 Ark. 45, 593 S.W.2d 458 (1980).

Where there was statutory authority for the creation of a police court, but the proceedings creating it were defective because the city never published any ordinance, bylaw or other act creating the

court, the unchallenged operation of the court for eight years was a sufficient basis to declare the court a de facto court so as to validate all of its previous actions and judgments since to do otherwise would create uncertainty, chaos and confusion. *Landthrip v. City of Beebe*, 268 Ark. 45, 593 S.W.2d 458 (1980).

Publication of Ordinance.

By enacting this section, the General Assembly did not mean that a city of the first class could create a police court without first publishing an ordinance, bylaw or other act creating such a court as required by § 14-55-206. *Landthrip v. City of Beebe*, 268 Ark. 45, 593 S.W.2d 458 (1980).

Cited: *O'Rourke v. State*, 298 Ark. 144, 765 S.W.2d 916 (1989).

16-18-112. Schedule of fees or monthly allowance for judge of police court, city court, or mayor's court — Designation of substitute judge of city court.

(a)(1)(A) The governing body of any city or town having a police court, city court, or a mayor's court may establish a schedule of fees to be paid by the city or town from the general fund to the judge of the court for the trial of cases in the court. However, the fee schedule or monthly allowance shall not be based upon the conviction of any person tried in the court.

(B) Alternatively, the governing body of the city or town may provide for the payment of a monthly allowance from the general fund of the city or town as compensation to the judge for sitting as judge in that court.

(2) However, the fee schedule or monthly allowance shall not be based upon the conviction of any person tried in the court.

(b)(1) The mayor of any city or town having a city court or mayor's court shall have, within the limits of the city, all the jurisdiction and power of a justice of the peace in all civil or criminal matters arising under the laws of this state, to all intents and purposes.

(2) For crimes and offenses committed within the limits of the city, the mayor's jurisdiction shall be coextensive with the county.

(c) The mayor shall give bond and security in any amount to be determined and approved by the city council.

(d)(1) The mayor shall have exclusive jurisdiction of all prosecutions for the violation of any ordinances of the city.

(2) He may award and issue any process or writs that may be necessary to enforce the administration of justice throughout the city, and for the lawful exercise of his jurisdiction, according to the usages and principles of law.

(e)(1) Any mayor of a city of the first class meeting the limitations of this section, any city of the second class, or any town may designate, at such times as he shall choose to do so, any attorney licensed in the State of Arkansas who resides in the county in which the city or town is situated, to sit in the mayor's stead as judge of the city court or mayor's court.

(2) Any person so designated by the mayor to sit as judge shall receive such remuneration as is provided by the governing body of the city or town as provided in this section.

History. Acts 1969, No. 292, § 1; 1971, No. 48, § 1; A.S.A. 1947, § 22-812; Acts 1995, No. 175, § 2; 1995, No. 1245, § 10.

A.C.R.C. Notes. Pursuant to Acts 1971, No. 153, each mayor's court is now a city court.

Pursuant to § 1-2-207, this section is set out above as amended by Acts 1995, No. 1245. This section was also amended by Acts 1995, No. 175, to read as follows:

"(a) The governing body of any city or town having a city court or a mayor's court may establish a schedule of fees to be paid by the city or town from the general fund to the judge of the court for the trial of cases in the court. Alternatively, the governing body of the city or town may provide for the payment of a monthly allowance from the general fund of the city or town as compensation to the judge for sitting as judge in that court. However, the fee schedule or monthly allowance shall not be based upon the conviction of any person tried in the court.

"(b) The mayor of any city or town having a city court or mayor's court shall have, within the limits of the city, all the jurisdiction and power of a justice of the peace in all civil or criminal matters arising under the laws of this state, to all intents and purposes. For crimes and offenses committed within the limits of the city, the mayor's jurisdiction shall be co-extensive with the county.

"(c) The mayor shall give bond and security in any amount to be determined and approved by the city council.

"(d)(1) The mayor shall have exclusive jurisdiction of all prosecutions for the violation of any ordinances of the city;

"(2) He may award and issue any process or writs that may be necessary to enforce the administration of justice throughout the city, and for the lawful exercise of his jurisdiction, according to the usages and principles of law.

"(e) Any mayor of a city of the first class meeting the limitations of this section, any city of the second class or any town may designate, at such times as he shall choose to do so, any attorney licensed in the State of Arkansas who resides in the county in which the city or town is situated, to sit in the mayor's stead as judge of the city court. Any person so designated by the mayor to sit as judge shall receive such remuneration as is provided by the governing body of the city or town as hereinabove provided."

Publisher's Notes. Acts 1995, No. 1245 became law without the Governor's signature.

Amendments. The 1995 amendment substituted "a police court, city court, or a mayor's court" for "a city court or a police court" in (a); inserted present (b), (c), and (d), redesignating former (b) as (e); and rewrote the first sentence in (e).

CASE NOTES

Cited: *Gore v. Emerson*, 262 Ark. 463, 557 S.W.2d 880 (1977).

CHAPTER 19

JUSTICE OF THE PEACE COURTS

SUBCHAPTER

1. GENERAL PROVISIONS.
2. JUSTICES.
3. CONSTABLES.
4. JURISDICTION AND VENUE.
5. PROCESS.
6. TRIAL.
7. DISMISSAL, DEFAULT, ETC.
8. JUDGMENT.
9. STAY OF EXECUTION.
10. EXECUTION, LEVY, AND SALE.
11. APPEAL.

RESEARCH REFERENCES

Am. Jur. 47 Am. Jur. 2d, Justices of the Peace, § 1 et seq.

Ark. L. Rev. Minimum Standards of Judicial Administration—Arkansas, 5 Ark. L. Rev. 1, 17.

Arkansas' Judiciary: Its History and Structure, 18 Ark. L. Rev. 152.

C.J.S. 51 C.J.S., Justices of the Peace, § 1 et seq.

SUBCHAPTER 1 — GENERAL PROVISIONS

SECTION.

- 16-19-101. Contempt.
- 16-19-102. Rules of procedure governing replevin, attachment, and garnishment.
- 16-19-103. Levy on real property by con-

SECTION.

- stable when no personalty available.
- 16-19-104. Petition for restoration of lost entries or papers.

Publisher's Notes. Some provisions of this chapter may be superseded by the Arkansas Rules for Inferior Courts pursuant to the Supersession Rule adopted by the Supreme Court of Arkansas in its order of December 18, 1978.

Effective Dates. Acts 1873, No. 135, § 127: effective on passage.

Acts 1875, No. 35, § 4: effective on passage.

Acts 1879, No. 70, § 4: effective on passage.

16-19-101. Contempt.

(a) In the following cases, and no other, a justice of the peace may punish as for contempts persons guilty of the following acts:

(1) Disorderly, contemptuous, and insolent behavior toward the justice of the peace while engaged in the trial of a cause, or in rendering a judgment, or in any judicial proceeding, which shall tend to interrupt such proceedings or impair the respect due to his authority;

(2) Any breach of the peace, noise, or any other disturbance tending to interrupt the official proceeding of the justice;

(3) Resistance unlawfully offered in the presence of the justice, to the execution of any lawful order or process issued by him;

(4) For the disobedience of any process issued by him, requiring the attendance of a witness.

(b) No person shall be punished for a contempt before a justice of the peace until an opportunity has been given him to be heard in his defense, and for that purpose the justice may issue a warrant to bring the offender before him.

(c) Upon the conviction of any person for a contempt, the justice shall prepare a record of the proceedings on the conviction stating the particular circumstances of the offense and the judgment rendered thereon.

(d) The warrant of commitment for any contempt shall set forth the particular circumstances of the offense, or it shall be void.

(e) Punishment for contempts in the cases provided for in this section may be by fine not exceeding thirty dollars (\$30.00) or by imprisonment in the county jail not exceeding five (5) days, at the discretion of the justice. However, no person shall remain in prison for the nonpayment of a fine.

History. Rev. Stat., ch. 86, §§ 16-20; C. §§ 1790-1794; A.S.A. 1947, §§ 26-701 — & M. Dig., §§ 1490-1494; Pope's Dig., 26-705.

RESEARCH REFERENCES

Ark. L. Rev. Legal Liability for the Exercise of Free Speech, 10 Ark. L. Rev. 155.

CASE NOTES

ANALYSIS

Disbarment.
Extent of power.

the courts of this state if such act is one warranting disbarment. *Dickerson v. State*, 120 Ark. 9, 179 S.W. 324 (1915).

Disbarment.

Disbarment of an attorney is no part of the punishment prescribed by this section for any contempt of which he may be guilty, nor does his punishment for any such contempt prevent his being disbarred from practicing in any court or all

Extent of Power.

Inferior courts do not possess power to punish for contempt except when committed in the presence of the court or in disobedience of its process. *Ex parte Patterson*, 110 Ark. 94, 161 S.W. 173 (1913).

16-19-102. Rules of procedure governing replevin, attachment, and garnishment.

The provisions of this act are not intended to govern the proceedings of justices of the peace in replevin and suits by attachment and garnishments, but those suits shall be governed by the rules of proceedings in force in the circuit courts of the state, so far as they are applicable to justice courts.

History. Acts 1873, No. 135, § 120, p. 430; C. & M. Dig., § 6502; Pope's Dig., § 8464; A.S.A. 1947, § 26-1201.

Meaning of "this act". Acts 1873, No. 135, codified as §§ 16-19-102, 16-19-202, 16-19-302, 16-19-402 — 16-19-404, 16-19-406, 16-19-407, 16-19-505, 16-19-506, 16-19-601 — 16-19-609, 16-19-611 — 16-19-613, 16-19-701 — 16-19-706, 16-19-801, 16-19-802, 16-19-901 — 16-19-909, 16-19-1001 — 16-19-1011, 16-19-1101 — 16-19-1108.

CASE NOTES

Complaint.

The affidavit in attachments or replevin answers the purpose of a complaint or statement of the cause of action. *Hanner v.*

Bailey, 30 Ark. 681 (1875); *Tignor v. Bradley*, 32 Ark. 781 (1878); *Hawes v. Robinson*, 44 Ark. 308 (1884).

16-19-103. Levy on real property by constable when no personalty available.

(a) Whenever a constable to whom is directed any writ of attachment issued by any justice of the peace of this state can find no personal property upon which to levy the writ, he may and shall levy the writ upon any lands, tenements, town lots, or interest in or equity of redemption in any real property belonging to the defendant in the attachment subject to execution by the laws of this state, and make his return accordingly, describing in the return the property so levied upon.

(b) In all cases in suits by attachment in which lands, tenements, town lots, or interest in or equity of redemption in any real property shall have been levied upon as provided for in subsection (a) of this section, the plaintiff, should he obtain judgment therein, shall be entitled to a transcript of the judgment and proceedings in the cause. Upon the filing of the transcript in the office of the clerk of the circuit court of the county in which the judgment was obtained, the judgment shall be entered in the docket of the circuit court for common law judgments and shall thenceforth have the same force and effect of a judgment rendered in the circuit court, upon which an order of sale shall be issued by the clerk of the court, directed to the sheriff of the county under which the property so seized and levied upon, and condemned to be sold by the judgment, shall be sold in the same manner and with the same notice as sales of real property under execution are made. However, no sale shall be made until the plaintiff executes bond to the defendant in the manner prescribed by law.

History. Acts 1875, No. 35, §§ 1, 2, p. 111; C. & M. Dig., §§ 6503, 6504; Pope's Dig., §§ 8465, 8466; A.S.A. 1947, §§ 26-1202, 26-1203.

Publisher's Notes. Acts 1875, No. 35, § 3, provided that the act should relate and apply to all suits by attachment before justices of the peace theretofore brought, or then pending, in which any

real estate or interest in, or equity of redemption of, any lands or tenements might have been levied upon and seized by any constable or sheriff by virtue of any such writ, and that sales made thereunder should have the same validity, force and effect as in cases brought after the passage of the act.

CASE NOTES

ANALYSIS

Constitutionality.

Bond.

Jurisdiction.

Constitutionality.

This section is constitutional. Bush v. Visant, 40 Ark. 124 (1882).

Bond.

Since the section provides for a bond "in the manner prescribed by law" and since the only provision of the law requiring bond was in case defendant was a nonresident, no bond was required under the

section where defendant was a resident. Merriman v. Sarlo, 63 Ark. 151, 37 S.W. 879 (1896).

Jurisdiction.

A justice of the peace has no jurisdiction to try title to land and should refuse an interplea for land on which an attachment from his court has been levied, and proceed to judgment without reference to the title. Cunningham v. Holland, 40 Ark. 556 (1883).

Cited: Rush v. State, 324 Ark. 147, 919 S.W.2d 933 (1996).

16-19-104. Petition for restoration of lost entries or papers.

(a) Whenever the dockets, entries, or papers of any justice of the peace shall have been lost or destroyed, any person interested in any of the lost dockets, entries, or papers may have the entry restored on the docket of the justice making the same, or his successor in office, or may have the paper or papers supplied by the justice with whom they were filed, or his successor in office, to take effect and be in force as if never lost or destroyed, by filing with the justice, or his successor in office, a petition verified by the affidavit of the person in interest, or of his agent or attorney, setting forth as nearly as possible a particular description of the lost or destroyed entry or paper, and if a judgment, note, or bond, stating the amount due thereon, with the rate of interest, and date, as near as may be, when the interest began to run, and stating that the judgment, note, or bond has not been paid, vacated, or in any manner satisfied or discharged, and causing a summons to be issued thereon, made returnable and served as in the case of ordinary suits before a justice.

(b) Upon the return day of the summons, if it shall appear that service thereof has been duly made, and the persons summoned shall fail to appear, and the justice shall be satisfied of the truth of the petition, judgment by default shall be rendered thereon restoring the docket entry, or supplying such papers as may have been lost, in which proceeding the plaintiff shall pay all the costs. However, if the defendant in the petition, or any person as his agent or attorney, shall appear

and on oath deny the statements or any material part thereof, the justice shall cause the facts in issue to be tried as in other actions. If judgment is given for the plaintiff, he shall recover all his costs.

(c) Executions and all other process necessary and proper in other judgments and proceedings before justices shall be issued for the enforcement of any lost or destroyed judgment or papers, with the same effect as if the judgment or papers had not been lost or destroyed.

History. Acts 1879, No. 70, §§ 1-3, p. Dig., §§ 8425-8427; A.S.A. 1947, §§ 26-92; C. & M. Dig., §§ 6463-6465; Pope's 1401 — 26-1403.

SUBCHAPTER 2 — JUSTICES

SECTION.

- 16-19-201. Refusal to act.
- 16-19-202. Entries on docket — Opening for inspection.
- 16-19-203. Maintenance of record books — Turning over records and papers to successors.
- 16-19-204. Succession to office upon justice's death.

SECTION.

- 16-19-205. Seal.
- 16-19-206. Disqualification of judges.
- 16-19-207. Vacating of office upon removal from precinct.
- 16-19-208. Resignation.

Effective Dates. Acts 1868 (Adj. Sess.), No. 5, § 25: effective on passage.

Acts 1871, No. 64, § 5: effective 30 days after passage.

Acts 1873, No. 135, § 127: effective on passage.

RESEARCH REFERENCES

ALR. Disqualification of judge because of assault or threat against him by party or person associated with party. 25 ALR 4th 923.

Malicious prosecution: defense of acting on advice of justice of the peace. 48 ALR 4th 250.

16-19-201. Refusal to act.

If any justice of the peace refuses to act in any criminal matter brought before him, or refuses to issue any criminal process when properly demanded, or refuses to issue process in any civil case when the legal fee for issuing the process has been tendered, he shall be deemed guilty of a misdemeanor in office and shall pay to the party injured any sum not less than ten dollars (\$10.00), to be recovered by a civil action.

History. Rev. Stat., ch. 86, § 14; C. & M. Dig., § 2822; Pope's Dig., § 3540; A.S.A. 1947, § 26-121.

16-19-202. Entries on docket — Opening for inspection.

(a) Every justice of the peace shall keep a docket, in which shall be entered in chronological order, with the proper date of each act done:

- (1) The title of each cause;
- (2) A brief statement of the nature and amount of the plaintiff's demand, and the defendant's setoff, if any, giving the date of each where dates exist;
- (3) The issuing of the process and return thereon;
- (4) The appearance of the respective parties;
- (5) Every adjournment, stating at whose instance and for what time;
- (6) The trial, and whether by a justice or a jury;
- (7) The verdict and judgment;
- (8) The execution, to whom delivered, and the amount of debt, damages, and costs endorsed thereon;
- (9) The giving of a transcript for filing in the clerk's office, or for setoff, if one is given;
- (10) A note of all motions made, and whether refused or granted; and
- (11) An itemized statement of all costs in the case.

(b) The docket shall be open to the inspection of any party interested, or his agent or attorney.

History. Acts 1873, No. 135, § 4, p. 430; C. & M. Dig., §§ 6408, 6409; Pope's Dig., §§ 8370, 8371; A.S.A. 1947, § 26-120.

CASE NOTES

ANALYSIS

Entry of judgment.
Evidence.

Entry of Judgment.

The fact that the justice of the peace entered a judgment on an ordinary tablet which he used for that purpose, instead of the docket, did not invalidate the judgment. *Price v. Shope*, 212 Ark. 420, 206 S.W.2d 752 (1947).

Evidence.

Docket entries of a justice are quasi records and, when certified, are receivable in evidence. *Gates v. Bennett*, 33 Ark. 475 (1878).

Recitals in the records of justices of the peace of jurisdiction, either of the parties or subject matter, are only prima facie

evidence of those facts and may be disproved. *Jones v. Terry*, 43 Ark. 230 (1884); *Visart v. Bush*, 46 Ark. 153 (1885); *Levy v. Ferguson Lumber Co.*, 51 Ark. 317, 11 S.W. 284 (1888); *Smith v. Finley*, 52 Ark. 373, 12 S.W. 782 (1889); *Townsly-Myrick Dry Goods Co. v. Fuller*, 58 Ark. 181, 24 S.W. 108 (1893).

The fact that a criminal proceeding before a justice has been dismissed must be shown by the judgment of dismissal entered in the justice's docket or the minutes of his proceedings; oral proof of such judgment is not competent until a sufficient foundation has been laid for such proof by a showing that the justice kept no docket or that the docket has been lost. *Twist v. Mullinix*, 126 Ark. 427, 190 S.W. 851 (1916).

16-19-203. Maintenance of record books — Turning over records and papers to successors.

(a) The county court of each county shall, upon the application of any justice of the peace, furnish the justice with two (2) good and substantial leather bound books, of at least six (6) quires each, to be used as civil and criminal dockets. However, all justices of the peace or other persons having in their possession, or entitled to receive from their predecessor in office, blank books as contemplated in this section shall not be entitled to receive such blank books from the county clerk.

(b) Each justice of the peace shall turn over to his successor in office all books and papers belonging to his office, and shall take the receipt of his successor therefor in duplicate, and file one (1) copy thereof in the county clerk's office.

(c) Any person or officer failing to comply with the provisions of this section shall be guilty of a misdemeanor and be fined in any sum not less than ten dollars (\$10.00) nor more than one hundred dollars (\$100).

History. Acts 1871, No. 64, §§ 1-3, p. 312; C. & M. Dig., §§ 6390-6392; Pope's Dig., §§ 8352-8354; A.S.A. 1947, §§ 26-108 — 26-110.

16-19-204. Succession to office upon justice's death.

(a) Whenever a justice of the peace in any township dies, his executors or administrators shall, as soon as a successor to such justice shall be commissioned and qualified, deliver to the successor his docket, records, books, and every official paper pertaining to his office. The justice to whom the docket, records, books, and papers are delivered shall have the full power and authority to do every official act which the justice to whose office he shall have succeeded might or could have done.

(b) Until every vacancy contemplated by this section has been filled, any justice of the peace of the same township to whom the records, books, and papers are delivered may hear and determine cases already commenced by another justice and shall also have power to issue execution, when judgment has already been rendered, in the same manner as though the cases and judgments rendered had been originally commenced before him. The justice shall return the paper and docket delivered to him for that purpose to those having the legal custody thereof.

(c) Whenever the docket, books, and papers of any justice of the peace are delivered to his successor in office, according to the provisions of subsection (a) of this section, the successor shall have the power to hear and determine cases already commenced and to issue execution upon judgments rendered by his predecessor, in the same manner and with like effect as though such cases and judgments rendered had been originally commenced before the successor.

(d) On the receipt of the records, books, and papers, the justice shall give to the person delivering them a receipt therefor, which receipt shall specify the books and papers so delivered and which shall be filed in the

office of the clerk of the circuit court of the county in which the justice may reside.

(e) It shall be the duty of the justice to whom the docket of any former justice of the peace has been delivered, according to the provisions of this section, as soon as the unfinished business upon the docket is disposed of, to file the docket with the clerk of the county court of the county in which the justice may reside.

(f) If his executor or administrator fails to deliver the justice's docket and other papers as required by subsection (a) of this section, the executor or administrator shall forfeit and pay any sum not less than ten dollars (\$10.00) nor more than one hundred dollars (\$100), one-half (½) thereof for the use of the person who shall sue for the amount, and one-half (½) for the use of the county, to be recovered by a civil action on the statute, in the name of any person who shall sue for the amount.

History. Acts 1843, §§ 2, 3, 5-9, p. 47; A.S.A. 1947, §§ 26-111 — 26-113, 26-115 C. & M. Dig., § 6391; Pope's Dig., § 8353; — 26-118.

CASE NOTES

ANALYSIS

Correction of judgment.

Identifying record of judgment.

Correction of Judgment.

A judgment of a justice may be corrected by his successor in office by a nunc pro tunc order. *Gates v. Bennett*, 33 Ark. 475 (1878).

Identifying Record of Judgment.

Testimony of a stranger identifying a record of the judgment of a justice of the peace is inadmissible in the absence of any explanation why neither the justice of the peace who rendered the alleged judgment nor his successor in office was present to identify the record. *Junior v. State*, 76 Ark. 483, 89 S.W. 467 (1905).

16-19-205. Seal.

(a) All justices of the peace are required to provide themselves with a seal, which shall state the name of the justice and the township, county, and state in which the justice was elected.

(b) The justice's seal shall be affixed to every acknowledgment of any and every instrument for the conveyance of land or an estate therein which the justice is by law authorized to execute or sign.

History. Acts 1939, No. 182, §§ 1, 2; A.S.A. 1947, §§ 26-105, 26-106.

CASE NOTES

Applicability.

This section has no applicability to acknowledgments to instruments other than

those for conveyances affecting land. *Tollett v. Knod*, 210 Ark. 781, 197 S.W.2d 744 (1946).

16-19-206. Disqualification of judges.

No judge of the circuit court, judge of the county court, judge of the court of probate, or justice of the peace shall sit on the determination of any cause or proceeding in which he is interested, or related to either party within the fourth degree of consanguinity or affinity, or shall have been of counsel, without the consent of the parties.

History. Rev. Stat., ch. 43, § 24; C. & M. Dig., §§ 2107, 6400; Pope's Dig., §§ 2711, 8362; A.S.A. 1947, § 22-113. § 24, is also codified as §§ 16-13-214, 16-13-312, 16-14-103, and 16-15-111.

Cross References. Computing degrees of consanguinity, § 28-9-212.

Publisher's Notes. Rev. Stat., ch. 43,

RESEARCH REFERENCES

Ark. L. Rev. Brill, The Arkansas Code of Judicial Conduct, 35 Ark. L. Rev. 247.

CASE NOTES

ANALYSIS

Purpose.
Presumption.
Relationship.

Purpose.

This section and § 16-13-101 tend to carry out the intention of Ark. Const., Art. 7, § 20. *Mears v. Hall*, 263 Ark. 827, 569 S.W.2d 91 (1978).

Presumption.

Where the record fails to show that the court acted on a suggestion of disqualification, it will be presumed that he found that he was not disqualified. *Davis v. Atkinson*, 75 Ark. 300, 87 S.W. 432 (1905).

Relationship.

The husband of the aunt is related to the husband of her niece within the fourth degree of affinity. *Kelly v. Neely*, 12 Ark. 657, 56 Am. Dec. 288 (1852).

An application to the Supreme Court, in the first instance, for a writ of certiorari to a justice of the peace because the circuit judge is of kin to the petitioner, and dis-

qualified, should show how he was related. *Ex parte Allston*, 17 Ark. (4 Barber) 580 (1856).

When a party to an action, knowing that the justice before whom the action is pending is related to the opposing party, permits judgment to go by default and appeals to the circuit court, he will be held to have waived the disqualification. *Morrow v. Watts*, 80 Ark. 57, 95 S.W. 988 (1906).

When the relationship is within the proscribed limits, neither the frequency of contact nor the closeness of the individuals bears on the result. *Morton v. Benton Publishing Co.*, 291 Ark. 620, 727 S.W.2d 824 (1987).

Where one spouse's relationship with a judge comes within the prohibition of Ark. Const., Art. 7, § 20, this section, and §§ 16-13-214, 16-13-312, 16-14-103, or 16-15-111, the other spouse shares the same degree of relationship by affinity to the judge. *Morton v. Benton Publishing Co.*, 291 Ark. 620, 727 S.W.2d 824 (1987).

Cited: *Braswell v. Gehl*, 263 Ark. 706, 567 S.W.2d 113 (1978).

16-19-207. Vacating of office upon removal from precinct.

When justices of the peace remove from their election precincts, their offices are vacated and they are liable to a fine of fifty dollars (\$50.00) for acting as such after their removal, to be recovered before any justice of the peace, for the use of the county.

History. Acts 1868 (Adj. Sess.), No. 5, § 6, p. 6; C. & M. Dig., § 6394; Pope's Dig., § 8356; A.S.A. 1947, § 26-119.

16-19-208. Resignation.

All resignations of justices of the peace shall be in writing and shall be addressed to the clerk of the county court, who shall immediately inform the Governor of the resignation.

History. Rev. Stat., ch. 86, § 23; C. & M. Dig., § 6396; Pope's Dig., § 8358; A.S.A. 1947, § 26-107.

SUBCHAPTER 3 — CONSTABLES

SECTION.

- 16-19-301. Peacekeeping duties and authority — Neglect of duty.
- 16-19-302. Proceedings against constables upon default.
- 16-19-303. Removal from office.
- 16-19-304. Failure to pay moneys collected — Responsibility of

SECTION.

- sureties — Relief from liability.
- 16-19-305. Continuance in office upon division of township.
- 16-19-306. Restriction on constables' authority to appoint deputies.

Cross References. Payment of funds into county treasury, § 26-39-201.

Effective Dates. Acts 1873, No. 135, § 127; effective on passage.

Acts 1941, No. 12, § 3: approved Jan. 30, 1941. Emergency clause provided: "It is hereby ascertained and declared that law enforcement in the several townships

of the state should not be impeded or delayed; and for said reasons it is declared that an emergency exists and this act being necessary for the immediate preservation of the public peace, health and safety, shall be in full force and effect from and after its passage."

RESEARCH REFERENCES

Am. Jur. 70 Am. Jur. 2d, Sheriff, § 1 et seq.

C.J.S. 80 C.J.S., Sheriffs & Constables, § 1 et seq.

16-19-301. Peacekeeping duties and authority — Neglect of duty.

(a) Each constable shall be a conservator of the peace in his township and shall suppress all riots, affrays, fights, and unlawful assemblies, and shall keep the peace and cause offenders to be arrested and dealt with according to law.

(b) If any offense cognizable before a justice of the peace in his township is committed in his presence, the constable shall immediately arrest the offender and cause him to be dealt with according to law.

(c) Nothing in subsection (a) or subsection (b) of this section shall be construed to deprive a constable of authority to serve warrants, summons, writs, and other process as provided by law.

(d) Nothing in this section shall prevent the fresh pursuit by a constable of a person suspected of having committed a supposed felony in his township, though no felony has actually been committed, if there are reasonable grounds for so believing. "Fresh pursuit" as used in this section shall not necessarily imply instant pursuit, but pursuit without unreasonable delay.

(e) If it comes to the knowledge of any constable that an offense mentioned in this section has been committed in his township, it shall be the duty of the constable to present the offender to a justice of the peace of the township in order that the offender may be arrested and brought to trial as prescribed by law.

(f) If a constable fails, refuses, or neglects to perform the duties imposed upon him by this section, he shall be deemed guilty of a misdemeanor, and upon conviction, by indictment in the circuit court, shall be fined not less than five dollars (\$5.00) nor more than one hundred dollars (\$100).

History. Rev. Stat., ch. 29, § 15; Acts 1941, No. 12, §§ 1, 2; A.S.A. 1947, §§ 26-1848, §§ 2-4, p. 36; C. & M. Dig., §§ 1448-210 — 26-213.
1451; Pope's Dig., §§ 1749-1752; Acts

CASE NOTES

ANALYSIS

Construction.
Powers and duties.

Construction.

This section does not conflict with § 16-81-301. *Reed v. State*, 330 Ark. 645, 957 S.W.2d 174 (1997).

Powers and Duties.

A constable is a peace officer and, as such, has authority to arrest offenders against the law; but he is not authorized to execute a warrant of arrest or other process directed to the sheriff unless deputized in the manner provided by law. *Winkler v. State*, 32 Ark. 539 (1877).

Constable is required to discharge his duties in a lawful and prudent manner. *Whitlock v. Wood*, 193 Ark. 695, 101 S.W.2d 950 (1937).

A constable is authorized to make an arrest and issue a valid citation charging one with the offense of driving a motor vehicle while intoxicated, first offense, which is committed in his presence within the township for which he was elected. *Credit v. State*, 25 Ark. App. 309, 758 S.W.2d 10 (1988).

Although a constable's general powers and duties are established by this section, a constable's authority to engage in the fresh pursuit of criminal suspects, whether suspected of committing felonies or misdemeanors, is derived from § 16-81-301. *Reed v. State*, 330 Ark. 645, 957 S.W.2d 174 (1997).

Cited: *Catlett v. Stewart*, 304 Ark. 637, 804 S.W.2d 699 (1991).

16-19-302. Proceedings against constables upon default.

(a) A justice of the peace shall, upon the demand of the party injured, or his agent, issue a summons against a constable to whom any execution has been delivered, or who has received any money upon any judgment of the justice, whether with or without execution:

(1) If the constable fails to make return of the execution according to the command thereof;

(2) If he makes a false return;

(3) If he fails to have any money collected by him on execution before the justice on the return day thereof, ready to be paid over to the party entitled thereto, or the receipt of such person therefor; or

(4) If he fails to pay over on demand to the person entitled thereto, or his agent, any money received by him in payment of any judgment.

(b) The summons shall require the constable to appear before the justice at a place and time to be specified therein, not exceeding ten (10) days, and show cause why an execution should not be issued against him for the amount due upon the execution placed in his hands, or for the amount received by him upon the judgment, according to the nature of the case. The summons shall be served at least four (4) days before the return day thereof and may in other respects be executed in the same manner as an original summons.

(c) If the constable fails to appear, or if he appears but fails to show good cause in reply to the matters alleged against him, the justice shall render judgment against him for the amount due on the execution, or for the amount received by him without execution, according to the nature of the case, together with interest thereon, at the rate of one hundred percent (100%) per annum, from the time the execution ought to have been returned, and from the time the money ought to have been had before the justice ready to be paid over to the parties entitled thereto, or from the time the money was received on the judgment without execution, or was demanded by the party or his agent.

(d) Any process issued against any constable shall be served and executed by a special deputy, who shall be appointed by the justice for that purpose and who shall have the same power to execute and return such process as a constable, and whose return shall be sworn to.

(e) Upon a judgment against a constable pursuant to this section, there shall be no stay of execution, but an appeal may be had as in other cases and with like effect.

(f) The party injured may proceed against the constable as provided in this section or may institute a suit against him on his official bond. When proceeding on the constable's official bond, the injured party shall be entitled to the same recovery as upon a summons against the constable.

History. Acts 1873, No. 135, §§ 88-94, Dig., §§ 8468-8473; A.S.A. 1947, §§ 26-p. 430; C. & M. Dig., §§ 6506-6511; Pope's 1501 — 26-1507.

CASE NOTES

Jurisdiction.

Where a constable was sued before a justice of the peace for a false return on execution, the justice was without juris-

diction as the amount in controversy exceeded the jurisdictional amount. *Merfield v. Burkett*, 56 Ark. 592, 20 S.W. 523 (1892).

16-19-303. Removal from office.

(a) If any constable fails to pay over any money collected by him after demand is made, or fails to return any execution or other process within the time specified in the process, or fails or neglects to perform any other duty required by law, he shall be removed from office by the county court on motion on charges exhibited against him.

(b) A copy of the charges, together with notice of the time of hearing the charges, shall be served on the constable at least five (5) days before the commencement of the term of the court at which the motion is made, which may be served in the same manner as a summons, and by any person over the age of twenty-one (21) years who would be a competent witness.

History. Rev. Stat., ch. 29, §§ 19, 20; §§ 1754, 1755; A.S.A. 1947, §§ 26-1508, C. & M. Dig., §§ 1453, 1454; Pope's Dig., 26-1509.

16-19-304. Failure to pay moneys collected — Responsibility of sureties — Relief from liability.

(a) If any constable receives from any person any bonds, bills, notes, or accounts for collection and gives his receipt therefor in his official capacity, and fails to pay to that person on demand the amount he may have collected, and fails to return the bonds, bills, notes, or accounts, if they have not been collected, the constable and his securities shall be responsible on his official bond for the amount of the bonds, bills, notes, or accounts not paid over or returned.

(b) No constable shall be responsible for any bond, bill, or note for which he may have given his receipts and on which suit may have been brought.

History. Rev. Stat., ch. 29, §§ 21, 22; §§ 1756, 1757; A.S.A. 1947, §§ 26-1510, C. & M. Dig., §§ 1455, 1456; Pope's Dig., 26-1511.

16-19-305. Continuance in office upon division of township.

If any township is divided, the constable in office at the time of the division shall continue in office and be constable of the township in which he resides.

History. Rev. Stat., ch. 29, § 23; C. & M. Dig., § 1457; Pope's Dig., § 1758; A.S.A. 1947, § 26-207.

16-19-306. Restriction on constables' authority to appoint deputies.

Constables in the various townships in this state shall have no authority to appoint deputies.

History. Acts 1977, No. 358, § 2; A.S.A. 1947, § 26-206.1; Acts 1999, No. 6, § 1.

Amendments. The 1999 amendment

deleted the former second and third sentences.

SUBCHAPTER 4 — JURISDICTION AND VENUE

SECTION.

- 16-19-401. Jurisdiction in townships having a municipal court.
- 16-19-402. Venue generally.
- 16-19-403. Joinder of defendants in different townships — Service of process by constable.
- 16-19-404. Venue where no justice of the peace in township or all justices disqualified.
- 16-19-405. Venue where defendants residing in different counties.
- 16-19-406. Change of venue to another justice upon showing of interest or prejudice.
- 16-19-407. Change of venue from township.

SECTION.

- 16-19-408. Improper venue of action.
- 16-19-409. Change of venue from justice of peace to municipal court.
- 16-19-410. Additional compensation of justices of the peace in townships having a municipal court.
- 16-19-411. Filing of reports of fees and costs.
- 16-19-412. Improper use of process — Granting privileges — Failure to report or pay over fines.
- 16-19-413. [Repealed.]

Cross References. Change of venue to municipal court, § 16-17-218.

Exclusive, concurrent, and criminal jurisdiction of justices of the peace, Ark. Const., Art. 7, § 40.

Effective Dates. Acts 1873, No. 135, § 127: effective on passage.

Acts 1875, No. 78, § 2: effective on passage.

Acts 1893, No. 171, § 5: effective on passage.

Acts 1927, No. 60, § 27: approved Feb. 28, 1927. Emergency clause provided: "This act being necessary for the immediate preservation of the public peace, health and safety, an emergency is declared to exist for the reason that in cities falling within the provisions of this act, their now exists much litigation which is being handled in justice of peace courts which are unable to try the civil and criminal cases coming before them in such a manner as to render justice, and make

possible an efficient enforcement of the law. It is therefore declared that this act shall take effect and be in force from and after its passage."

Acts 1937, No. 216, § 2: Mar. 8, 1937. Emergency clause provided: "That this act being necessary for the welfare, peace and health, an emergency is hereby declared to exist, and this act shall take effect and be in force from and after its passage and approval."

Acts 1949, No. 224, § 2: approved Mar. 3, 1949. Emergency clause provided: "Whereas, under the present laws limiting the venue of actions before justice of the peace and municipal courts, considerable delay is caused by reason of the fact that there exists no procedure for the transfer of causes wherein the venue is improper, therefore this Act is necessary for the immediate preservation of the public peace, health and safety and an emergency is hereby declared to exist and this

Act shall be in full force and effect from and after its passage.”

Acts 1983, No. 918, § 16: Mar. 30, 1983. Emergency clause provided: “It is hereby found and determined by the Seventy-Fourth General Assembly that the act of driving a motor vehicle while under the influence of intoxicating alcoholic beverages or drugs constitutes a serious and immediate threat to the safety of all citizens of this State, and that increasing the penalty for this dangerous conduct may serve as a deterrent to such behavior. Further, it is found that increased income derived from the levying of such penalties can best be utilized to provide immediate alcohol and drug safety and rehabilitation and treatment programs both to prevent an increase in the use of intoxicating alcoholic beverages and drugs and to rehabilitate persons convicted of related offenses. Therefore, an emergency is hereby

declared to exist, and this Act being necessary for the immediate preservation of the public peace, health, and safety shall be in full force and effect from and after the date of its passage and approval.”

Acts 1995, No. 1032, § 13: July 1, 1995. Emergency clause provided: “It is hereby found and determined by the Eightieth General Assembly, that in order for the Department of Health to become more efficient in accounting and budgetary practices due to the transfer of the Bureau of Alcohol and Drug Abuse Prevention, changes in various funds are needed; and that the provisions of this Act provide such changes. Therefore, an emergency is hereby declared to exist and this Act being necessary for the immediate preservation of the public peace, health and safety shall be in full force and effect from and after July 1, 1995.”

CASE NOTES

Cited: *Griffin v. State*, 297 Ark. 208, 760 S.W.2d 852 (1988).

16-19-401. Jurisdiction in townships having a municipal court.

(a) Justices of the peace in the townships subject to this act shall have original jurisdiction coextensive with the county.

(b) The jurisdiction of justices of the peace shall be:

(1) Concurrent with the municipal courts and exclusive of the circuit court in all matters of contract where the amount in controversy does not exceed the sum of one hundred dollars (\$100), excluding interest;

(2) Concurrent with the municipal courts and with the circuit court in matters of contract where the amount in controversy does not exceed the sum of three hundred dollars (\$300), exclusive of interest;

(3) Concurrent with the municipal courts and with the circuit court in suits for the recovery of personal property where the value of the property does not exceed the sum of three hundred dollars (\$300);

(4) Concurrent with the municipal courts and with the circuit court in all matters of damage to personal property where the amount in controversy does not exceed the sum of one hundred dollars (\$100).

(c) Justices of the peace in townships subject to this act shall also have jurisdiction to sit as examining courts and commit, discharge, or recognize offenders to the court having jurisdiction for further trial, and to bind persons to keep the peace or for good behavior, and for purposes set out in this section they shall have power to issue all necessary process.

History. Acts 1927, No. 60, § 17; Pope's Dig., § 9913; A.S.A. 1947, § 22-724.

Publisher's Notes. Acts 1927, No. 60, § 17, is also codified as § 16-17-217.

Meaning of "this act". Acts 1927, No. 60, codified as §§ 16-17-201, 16-17-202 [repealed], 16-17-203 — 16-17-207, 16-17-

209 — 16-17-215, 16-17-216 [repealed], 16-17-217, 16-17-218 [superseded], 16-17-219 — 16-17-222, 16-17-223 [repealed], 16-17-224, 16-19-401, 16-19-409 [superseded], and 16-19-410 — 16-19-412.

Cross References. Jurisdiction of municipal courts, § 16-17-206.

CASE NOTES

ANALYSIS

Criminal offense.

Evidence.

Garnishment.

Presumption.

Criminal Offense.

The Arkansas Constitution prohibits the City of Springdale from having jurisdiction over criminal offenses committed in Benton County. *Sexson v. Municipal Court*, 312 Ark. 261, 849 S.W.2d 468 (1993).

Evidence.

Evidence dehors the record may be received, when it does not tend to contradict the record itself, for the purpose of showing jurisdiction in the suit. *Saint Louis,*

I.M. & S. Ry. v. Lindsay, 55 Ark. 281, 18 S.W. 59 (1892) (decision under prior law).

Garnishment.

In garnishment, jurisdiction is coextensive with the county. *Foster v. Pollock*, 173 Ark. 48, 291 S.W. 989 (1927).

Presumption.

Nothing can be presumed which is necessary to give the justice jurisdiction, but where jurisdiction appears on the face of the proceedings, mere errors or irregularities are not subject to collateral attack; the attack must go to the jurisdiction. *Webster v. Daniel*, 47 Ark. 131, 14 S.W. 550 (1886) (decision under prior law).

Cited: *Lovell v. State*, 283 Ark. 425, 678 S.W.2d 318 (1984).

16-19-402. Venue generally.

(a) Actions cognizable before a justice of the peace, instituted by summons or warrant, shall be brought before a justice of the peace in the township wherein the defendant resides or is found. If there are defendants in different townships, then the action shall be brought in the township where any one of the defendants resides or is found.

(b) Notwithstanding any other provision of this section, in a township having a population of less than three thousand (3,000) as shown by the most recent federal census, actions by attachment, actions for the recovery of personal property, actions for provisional remedy, and all criminal actions and proceedings may be brought before any justice of the peace in the county, although in counties where there is a municipal court having countywide or districtwide jurisdiction, actions by attachment, actions for the recovery of personal property, actions for provisional remedy, and all criminal actions, unless brought in, or transferred to, the municipal court, shall be tried before a justice of the peace in the township where any defendant to the action resides, or in the township where the property or money involved is found.

History. Acts 1873, No. 135, § 2, p. 430; 1875, No. 78, § 1, p. 187; C. & M. Dig., § 6401; Acts 1929, No. 282, § 1;

1937, No. 216, § 1; Pope's Dig., § 8363; A.S.A. 1947, § 26-301.

Publisher's Notes. Acts 1929, No. 282,

§ 2, provided, in part, that this section should be cumulative to existing laws.

CASE NOTES

Attachment.

A judgment for the amount of the debt in an attachment suit based on service of process in the county outside of the township of the justice of the peace is valid

though no property is found on which to levy the writ of attachment. *Ribelin v. Wilks*, 135 Ark. 599, 205 S.W. 977 (1918).

Cited: *Griffin v. State*, 297 Ark. 208, 760 S.W.2d 852 (1988).

16-19-403. Joinder of defendants in different townships — Service of process by constable.

If there are several defendants who reside in different townships and who are jointly liable to a suit, the suit may be brought in any of the townships against all of the defendants. The constable of the township in which the suit may be brought shall serve the process in the several townships wherein the defendants may reside.

History. Acts 1873, No. 135, § 2, p. 430; C. & M. Dig., § 6402; Pope's Dig., § 8364; A.S.A. 1947, § 26-302.

16-19-404. Venue where no justice of the peace in township or all justices disqualified.

Whenever there is no justice of the peace within the township where any suit cognizable before a justice ought to be brought, or when all the justices of the township are interested in any such suit or otherwise disqualified by law from trying the suit, every such suit may be brought before a justice in the same county.

History. Acts 1873, No. 135, § 3, p. 430; C. & M. Dig., § 6403; Pope's Dig., § 8365; A.S.A. 1947, § 26-303.

16-19-405. Venue where defendants residing in different counties.

In any civil action cognizable before any justice of the peace in a township of the county in which any of the defendants resides, suit may be brought before any justice of the peace in the township of the county in which any one of the defendants resides. The summons or other process against the other defendants shall issue to any constable in the counties in which the other defendants may reside, which summons or other process, when served, shall give the justice before whom the suit is brought the same jurisdiction he would have if all of the defendants resided in his county.

History. Acts 1893, No. 171, § 1, p. 301; C. & M. Dig., § 6404; Pope's Dig., § 8366; A.S.A. 1947, § 26-304.

CASE NOTES

ANALYSIS

Improper service.
Waiver.

Improper Service.

Where nonresident defendant was not properly served and objected to lower courts' assumption of jurisdiction in apt time, the judgment against him would be reversed and dismissed. *Seelbinder v. Witherspoon*, 124 Ark. 331, 187 S.W. 325 (1916).

Waiver.

Where the defendant in an action before a justice of the peace filed an affidavit for

appeal from a judgment against him rendered by that court and also gave an appeal bond, he will be held to have entered his appearance in the circuit court and cannot object to want of jurisdiction of his person in the lower court. *German Inv. Co. v. Westbrook*, 101 Ark. 124, 141 S.W. 510 (1911).

Cited: *Peel v. Kelley*, 268 Ark. 90, 594 S.W.2d 11 (1980).

16-19-406. Change of venue to another justice upon showing of interest or prejudice.

(a) Either party in a suit before a justice of the peace may take a change of venue from one justice of the peace to another in the same township, but it shall be the duty of the party so applying, before the commencement of the trial, to file an affidavit among the papers in the action alleging that the justice is a material witness for the affiant, or of near relation to the other party, or so prejudiced against the affiant that he cannot obtain a fair and impartial trial before that justice. The justice shall thereupon transmit all the original papers in the case and a certified transcript of the proceedings to the nearest justice of the peace in the same township, who shall proceed in the case in the same manner as if the suit had originally been commenced before him.

(b) If there is no other justice of the peace in the township competent to try the case, it shall be certified to the nearest justice in any adjoining township, who shall try and determine the case in the same manner as if the parties were residents of his township and the suit had been originally commenced before him.

(c) Notwithstanding any other provision of this section, the same party shall not be allowed to file an affidavit pursuant to this section against two (2) justices in the same case.

History. Acts 1873, No. 135, §§ 20, 21, p. 430; C. & M. Dig., §§ 6418, 6419; Pope's Dig., §§ 8380, 8381; A.S.A. 1947, §§ 26-306, 26-307.

CASE NOTES

ANALYSIS

Applicability.
Waiver of disqualification.

Applicability.

Where a mayor of a town in a prohibi-

tion district institutes a summary proceeding for the destruction of liquors kept therein for sale contrary to law, he is acting as mayor and not as "ex officio" justice of the peace, and this section is not applicable. *Betts v. Ward*, 79 Ark. 146, 95 S.W. 148 (1906).

Waiver of Disqualification.

When a party to an action, knowing that the justice before which the action is pending is related to the opposing party, permits the judgment to go by default and afterward appeals to the circuit court, he

will be held to have waived that disqualification. *Morrow v. Watts*, 80 Ark. 57, 95 S.W. 988 (1906).

Cited: *Peel v. Kelley*, 268 Ark. 90, 594 S.W.2d 11 (1980).

16-19-407. Change of venue from township.

(a) Either party, at the calling of a cause before a justice of the peace, may make an affidavit to the effect that he verily believes he cannot obtain a fair and impartial trial in the township in which the action is pending and may include in his affidavit one (1) township in addition to the one in which the action is pending, and the opposite party may, without affidavit, object to the same number of townships to which the party making the application has objected. Thereupon, it shall be the duty of the justice to make an order for the change of venue to a justice in a township to which there is no valid objection and which is in his judgment most convenient to the parties and their witnesses. The justice shall then transmit, without delay, the original papers in the case and a transcript of the proceedings to the justice to whose court the venue is changed, for which the transmitting justice shall receive five cents (5¢) per mile to and from the office of the justice to whom the cause is transmitted, which shall be taxed and collected as other costs in the case, together with his costs for making out the transcript.

(b) If the justice of the peace to whom the papers are so transferred cannot immediately, upon the reception and filing of the papers, proceed to try the case, it shall be his duty at once to fix a time therefor, of which all parties shall take notice.

History. Acts 1873, No. 135, §§ 22, 23, p. 430; C. & M. Dig., §§ 6420, 6421; Pope's Dig., §§ 8382, 8383; A.S.A. 1947, §§ 26-308, 26-309.

16-19-408. Improper venue of action.

(a) Whenever an objection is made by a defendant in any action cognizable before a justice of the peace or a municipal court, instituted by summons or warrant, or in an action by an attachment, an action for the recovery of personal property, an action by provisional remedy, or in any criminal action or proceeding, that the action was brought before a justice of the peace or a municipal court wherein the venue is improper under the laws of the State of Arkansas, the court shall immediately hear proof on the question. If it is established by proof that the venue is improper, then all further proceedings shall be discontinued and the justice of the peace or clerk of the municipal court shall transmit to a justice of the peace or municipal court wherein the venue is proper all the original papers in the case, including the bail bond, if there is any.

(b) If the defendant is in custody, he shall be taken and delivered before the justice of the peace or the municipal court, and the bail, if any, shall be liable for the appearance of the defendant in the court to which the papers are transmitted.

(c) The court to which the papers are transmitted shall proceed to try the action in all respects as if the action had been originally brought to the court.

History. Acts 1949, No. 224, § 1; A.S.A. 1947, § 26-310.

RESEARCH REFERENCES

Ark. L. Rev. Acts 1949 General Assembly—Act 224 Change of Venue in Inferior Courts, 3 Ark. L. Rev. 359.

16-19-409. Change of venue from justice of peace to municipal court.

(a) In any case, either civil or criminal, brought before a justice of the peace in any township in the county wherein a municipal court exists, the judge may grant a change of venue to the municipal court, upon defendant's motion and a showing of good cause, without the prepayment or tender of any fees. Upon granting of the motion, the justice of the peace shall have no further jurisdiction in the case, except for the purpose of preparing a transcript for the municipal court.

(b) In the event of any change of venue from a justice of the peace to a municipal court in the counties where more than one (1) municipal court exists, the case shall be transferred to the nearest municipal court geographically in the county.

(c) In no event shall any change of venue lie from any municipal court to any justice of the peace in either civil or criminal cases.

History. Acts 1989 (3rd Ex. Sess.), No. 55, § 1.

A.C.R.C. Notes. Former § 16-19-409, concerning change of venue from justice of peace to municipal court, is deemed to be superseded by this section. The former

section was derived from Acts 1927, No. 60, § 21; Pope's Dig., § 9917; Acts 1961, No. 178, § 1; A.S.A. 1947, § 22-725.

Publisher's Notes. Acts 1989 (3rd Ex. Sess.), No. 55, § 1, is also codified as § 16-17-218.

CASE NOTES

ANALYSIS

Constitutionality.
City court.
Mandamus.
Mayor's court.
Prohibition.
Request.

Constitutionality.

Divestment of jurisdiction from the city court is not contrary to Ark. Const., Art. 7, § 43, which gives the General Assembly authority to set jurisdiction of corporation courts. *City Court v. Tiner*, 292 Ark. 253, 729 S.W.2d 399 (1987).

City Court.

Jurisdiction of city court, like that of the justice of peace, is subject to a motion to transfer to municipal court when a state offense is involved, and upon the filing of a motion to take a change of venue, jurisdiction is withdrawn from the city court. *City Court v. Tiner*, 292 Ark. 253, 729 S.W.2d 399 (1987).

Mandamus.

Mandamus is the proper remedy to compel justice of the peace to transfer case to municipal court when motion is filed. *Brickell v. Guaranty Loan & Trust Co.*, 192 Ark. 652, 93 S.W.2d 656 (1936).

Mayor's Court.

The jurisdiction of the mayor's court, like that of the justice of the peace, is subject to a motion to transfer to municipal court when a state offense is involved. *Russell v. Miller*, 253 Ark. 583, 487 S.W.2d 617 (1972).

This section does not automatically allow change of venue away from a mayor's court, as § 16-88-101 also applies. *McKnight v. Newkirk*, 256 Ark. 342, 507 S.W.2d 98 (1974).

Prohibition.

Writ of prohibition held proper where trial court was entirely without jurisdic-

tion. *City Court v. Tiner*, 292 Ark. 253, 729 S.W.2d 399 (1987).

Request.

The defendant charged with a misdemeanor before a justice of the peace may have a trial in the municipal court only by requesting a change of venue to that court. *Lee v. Watts*, 243 Ark. 957, 423 S.W.2d 557 (1968).

Cited: *Overton v. Alston*, 199 Ark. 96, 132 S.W.2d 834, 133 S.W.2d 442 (1939); *Griffin v. State*, 297 Ark. 208, 760 S.W.2d 852 (1988).

16-19-410. Additional compensation of justices of the peace in townships having a municipal court.

A justice of the peace in a township subject to this act shall receive as compensation for his services the sum of twenty-five dollars (\$25.00) per year, in equal quarterly installments, payable by the county, in addition to the compensation provided for by Acts 1875, No. 55, § 76 [repealed], and such fees as are allowed to justices of the peace by law for solemnizing marriages, taking and certifying acknowledgments of instruments, and attending to the duties of coroner, and for service in relation to estrays.

History. Acts 1927, No. 60, § 18; Pope's Dig., § 9914; A.S.A. 1947, § 22-726.

Publisher's Notes. Acts 1927, No. 60, § 18, is also codified as § 16-17-219.

Meaning of "this act". See note to § 16-19-401.

16-19-411. Filing of reports of fees and costs.

Justices of the peace in townships subject to this act shall, on or before the first day of county court, at each term thereof, file in the office of the county clerk a report, under oath, of all fees and costs taxed and collected in civil actions during the preceding quarter, giving the title of the cause and attaching to the report receipts of the county treasurer of all fees and costs collected during the period.

History. Acts 1927, No. 60, § 22; Pope's Dig., § 9918; A.S.A. 1947, § 22-727.

Publisher's Notes. Acts 1927, No. 60, § 22, is also codified as § 16-17-220.

Meaning of "this act". See note to § 16-19-401.

16-19-412. Improper use of process — Granting privileges — Failure to report or pay over fines.

Any municipal judge, or any justice of the peace in townships subject to this act, who makes use, directly or indirectly, of the process of his own court, either as a party litigant or in interest or as an attorney or agent for any party litigant or in interest, or who offers or gives by way of remission of fees or otherwise any pecuniary inducements to the instituting or maintaining of any suits, prosecutions, or proceedings in his court, and any justice of the peace, or constable in townships subject to this act, or sheriffs in counties subject to this act, or clerks of the municipal court, or chief of police in any city subject to this act, who fails to report or pay over fines, penalties, forfeitures, fees, or costs collected by him, shall be deemed guilty of a misdemeanor and, on conviction for each of these offenses, shall be punished by a fine of not less than fifty dollars (\$50.00) nor more than five hundred dollars (\$500). A conviction under this section shall work a forfeiture of office. Notwithstanding any other provision of this section, sheriffs and constables may retain the fees and costs due them out of each cause.

History. Acts 1927, No. 60, § 23; Pope’s Dig., § 9919; A.S.A. 1947, § 22-728.
Publisher’s Notes. Acts 1927, No. 60, § 23, is also codified as § 16-17-221.

Meaning of “this act”. See note to § 16-19-401.

16-19-413. [Repealed.]

A.C.R.C. Notes. Pursuant to § 1-2-207, the amendment to this section by Acts 1995, No. 1032, §§ 4 and 9, was superseded by the repeal of this section by Acts 1995, No. 1256.
Publisher’s Notes. This section, concerning disposition of additional court

costs imposed by § 5-65-113 [repealed], was repealed by Acts 1995, No. 1256, § 20, as amended by Acts 1995 (1st Ex. Sess.), No. 13, § 4. The section was derived from Acts 1983, No. 918, § 1; A.S.A. 1947, § 75-2531; Acts 1995, No. 1032, §§ 4, 9.

SUBCHAPTER 5 — PROCESS

SECTION.
16-19-501. Authority to issue subpoenas.
16-19-502. Payment in advance for issuance of process.
16-19-503. Service of process by constable — Fees.
16-19-504. Vacancy in constable’s office — Service by constable of ad-

SECTION.
joining township — Mileage fees.
16-19-505. Appointment of special agents to execute process — Endorsement on writ.
16-19-506. Manner of service and return.

Effective Dates. Acts 1845, § 3, p. 46: effective on passage.
Acts 1873, No. 135, § 127: effective on passage.
Acts 1875, No. 77, § 53: effective on passage.
Acts 1893, No. 171, § 5: effective on passage.

16-19-501. Authority to issue subpoenas.

Justices of the peace shall have the same power to issue subpoenas for witnesses in civil and criminal actions pending before them and in preliminary examinations being heard by them, where such witnesses reside outside of their counties, as is given by law in similar cases to the circuit court.

History. Acts 1893, No. 171, § 2, p. 508; Dig., §§ 4170, 8367; A.S.A. 1947, § 26-301; C. & M. Dig., §§ 3322, 6405; Pope's Dig., §§ 1759, 8368.

16-19-502. Payment in advance for issuance of process.

In all civil cases before a justice of the peace, the same advance payments shall be made, or bond and security given, as are provided for clerks for the issuance of any writ or process.

History. Acts 1875, No. 77, § 35, p. 167; C. & M. Dig., § 4602; Pope's Dig., § 5691; A.S.A. 1947, § 26-509.

16-19-503. Service of process by constable — Fees.

(a)(1) The summons and other process mentioned in § 16-19-405 and the subpoenas mentioned in § 16-19-501 shall be directed to and shall be served by any constable in the county in which the party or parties to be served reside. The constables are given as full powers to serve such process as they are given by law to serve the process of justices of the peace of their own county.

(2) Each constable may execute civil process throughout the county.

(b) In no case shall the constable be allowed mileage for the service of any process he may serve outside of his township, other than from the residence of the defendant in such process to the nearest justice of the peace in the township in which that defendant resides.

History. Rev. Stat., ch. 29, § 26; Acts 1893, No. 171, § 3, p. 301; C. & M. Dig., §§ 1458, 6406; Pope's Dig., §§ 1759, 8368; A.S.A. 1947, §§ 26-502, 26-505.

16-19-504. Vacancy in constable's office — Service by constable of adjoining township — Mileage fees.

(a) When the office of constable in any township becomes vacant by death, resignation, refusal or neglect to qualify, or failure to elect, any constable of any adjoining township, during the vacancy, shall execute and return all process which are issued by any justice of the peace in the township where the constable's office is vacant and which are directed to him, against any person in the township where the vacancy exists.

(b) In addition to the fees now allowed by law, the constable shall receive for the service of each and every summons or subpoena, or other process, except executions, so directed to him, two and one-half cents (2½¢) per mile, going and returning from his own residence to that of the person named in the process residing farthest from him.

History. Acts 1845, § 1, p. 46; C. & M. Dig., § 1459; Pope's Dig., § 1760; A.S.A. 1947, § 26-503.

16-19-505. Appointment of special agents to execute process — Endorsement on writ.

Justices of the peace shall have power to appoint special agents to execute orders of arrest, attachments, and other provisional remedies and the summons which accompanies them, whenever an affidavit is filed with the justice by the plaintiff or his agent to the effect that he believes that, owing to the absence or difficulty of procuring a proper officer, the process or other order cannot be executed without injurious delay. In cases where there is no constable in the township, and the appointment provided for in this section shall be made, an endorsement shall be made on the writ or order and signed by the justice.

History. Acts 1873, No. 135, § 8, p. 430; C. & M. Dig., §§ 6414, 6415; Pope's Dig., §§ 8376, 8377; A.S.A. 1947, § 26-504.

16-19-506. Manner of service and return.

(a) The service and return thereto of the process provided for in this chapter shall be made in the same manner as in the circuit court, except that no service other than is provided for in this chapter shall be made by publication, nor shall any return made by anyone other than the sheriff, coroner, or constable of the county be valid unless sworn to.

(b) The service of process shall be by:

(1) Delivering to the defendant a copy of the summons, and, if he refuses to receive it, the offer of it to him shall be a sufficient service; or

(2) Leaving a copy of such summons at the usual place of abode of the defendant with some person who is a member of his family over the age of fifteen (15) years; or

(3) Reading it to and in the presence of the defendant.

History. Acts 1873, No. 135, §§ 9, 10, p. 430; C. & M. Dig., §§ 6416, 6417; Pope's Dig., §§ 8378, 8379; A.S.A. 1947, §§ 26-506, 26-507.

A.C.R.C. Notes. The Supreme Court of Arkansas stated in its Per Curiam of

November 24, 1986, that subsection (a) of this section was deemed superseded by the Arkansas Rules of Appellate Procedure and the Arkansas Rules for Inferior Courts.

CASE NOTES

Delivery to Neighbor.

Delivery of a copy of the summons to a neighbor of the defendant was insufficient

to sustain a judgment. *Nelson v. Freeman*, 136 Ark. 396, 206 S.W. 667 (1918).

SUBCHAPTER 6 — TRIAL

SECTION.

- 16-19-601. Trial by court or jury.
 16-19-602. Adjournment.
 16-19-603. Continuances — Testimony of adverse party's witness.
 16-19-604. Jurors — Number and qualifications.
 16-19-605. Challenges to jurors.
 16-19-606. Jurors — Oath.
 16-19-607. Jury to hear evidence in a body.
 16-19-608. Witnesses generally.

SECTION.

- 16-19-609. Examination of adversary — Effect of refusal to submit to examination — Application on appeal.
 16-19-610. Witness and juror attendance and mileage fees.
 16-19-611. Verdict — Entry on docket.
 16-19-612. Failure of jury to agree — Retrial.
 16-19-613. New trial granted on motion — Exception.

Effective Dates. Acts 1873, No. 135, § 127: effective on passage.
 Acts 1893, No. 71, § 2: effective on passage.

Acts 1893, No. 171, § 5: effective on passage.

16-19-601. Trial by court or jury.

After the parties appear and the issues have been made up, the matters in controversy may be submitted by them to the justice. If a jury is demanded by either party, the justice shall order a jury to be forthwith summoned and impaneled to try the action.

History. Acts 1873, No. 135, § 24, p. 430; C. & M. Dig., § 6431; Pope's Dig., § 8393; A.S.A. 1947, § 26-608.

CASE NOTES

Equity.

A justice may apply equitable doctrines to the solution of questions properly coming within his jurisdiction, but he cannot

administer the flexible remedies of equity jurisprudence. *Whitesides v. Kershaw & Driggs*, 44 Ark. 377 (1884); *Thompson v. Ogle*, 55 Ark. 101, 17 S.W. 593 (1891).

16-19-602. Adjournment.

If from any cause, the justice of the peace is unable to attend the trial at the time fixed, or if a jury is demanded, the justice may adjourn the case for a period not exceeding three (3) days, but shall not make more than two (2) adjournments for that cause.

History. Acts 1873, No. 135, § 14, p. 430; C. & M. Dig., § 6425; Pope's Dig., § 8387; A.S.A. 1947, § 26-604.

16-19-603. Continuances — Testimony of adverse party's witness.

(a) Either party may obtain a postponement of the cause not exceeding thirty (30) days, on account of the absence of evidence by filing an affidavit like that required in § 16-63-402, subject to such terms as the court may impose.

(b) Either party who shall apply for the postponement of a cause shall, if required by the adverse party, consent that the testimony of any witness of the adverse party who is in attendance be then taken to be used on the trial of the cause.

History. Acts 1873, No. 135, §§ 18, 19, Dig., §§ 8391, 8392; A.S.A. 1947, §§ 26-p. 430; C. & M. Dig., §§ 6429, 6430; Pope's 606, 26-607.

RESEARCH REFERENCES

Ark. L. Rev. Continuances in Arkansas, 4 Ark. L. Rev. 449.

16-19-604. Jurors — Number and qualifications.

The jury shall be composed of six (6) jurors who shall be qualified as required in the circuit courts. However, a lesser number of jurors may be agreed upon by the parties.

History. Acts 1873, No. 135, § 24, p. 430; C. & M. Dig., § 6431; Pope's Dig., § 8393; A.S.A. 1947, § 26-608.

16-19-605. Challenges to jurors.

(a) In the formation of a jury, each party shall be entitled to three (3) peremptory challenges, and any deficiencies in the number of jurors summoned, arising from any cause, may be supplied by summoning others in their stead.

(b) In all cases before justices of the peace in this state, it shall be a legal cause for challenge that anyone selected as a juror has served as a juror in a justice's court in the same county within three (3) months prior to the institution of the suit in which the juror is selected.

History. Acts 1873, No. 135, § 25, p. 430; 1893, No. 71, § 1, p. 116; C. & M. Dig., §§ 3321, 6432, 6433; Pope's Dig., §§ 4169, 8394, 8395; A.S.A. 1947, §§ 26-609, 26-610.

RESEARCH REFERENCES

UALR L.J. Note, Peremptory Challenges After *Purkett v. Elam*, 115 S. Ct. 1769 (1995): How to Judge a Book By Its

Cover Without Violating Equal Protection, 19 UALR L.J. 249.

CASE NOTES

ANALYSIS

Prosecutorial misconduct.
Standard of review.
—Racial discrimination.

Prosecutorial Misconduct.

Both in this case and in the trial preceding *Miller v. Lockhart*, 861 F. Supp. 1425 (E.D. Ark. 1994), the prosecutor consistently and systematically excluded African-Americans from participating as jurors through the use of peremptory challenges. *Ford v. Lockhart*, 861 F. Supp.

1447 (E.D. Ark. 1994), petition dismissed, *In re Norris*, 38 F.3d 1046 (8th Cir. 1994), *aff'd sub nom. Ford v. Norris*, 67 F.3d 162 (8th Cir. 1995).

Standard of Review.**—Racial Discrimination.**

A constitutional violation involving the selection of jurors in a racially discriminatory manner is a “structural defect” in the trial mechanism which cannot be subjected to a harmless error analysis. *Ford v. Norris*, 67 F.3d 162 (8th Cir. 1995).

16-19-606. Jurors — Oath.

The justice of the peace shall administer to each juror an oath well and truly to try the matter in controversy between, plaintiff, and, defendant, and a true verdict give according to the evidence, unless discharged by the justice of the peace.

History. Acts 1873, No. 135, § 26, p. 430; C. & M. Dig., § 6434; Pope’s Dig., § 8396; A.S.A. 1947, § 26-611.

16-19-607. Jury to hear evidence in a body.

After the jury are sworn, they shall sit together and hear the allegations and proofs of the parties, which shall be delivered publicly in their presence.

History. Acts 1873, No. 135, § 27, p. 430; C. & M. Dig., § 6435; Pope’s Dig., § 8397; A.S.A. 1947, § 26-612.

16-19-608. Witnesses generally.

(a) Every person offered as a witness, before any testimony shall be given by him, shall be duly sworn that the evidence he shall give relating to the matter between, plaintiff, and, defendant, shall be the truth, the whole truth, and nothing but the truth.

(b) If a witness, on being produced, shall be objected to as incompetent, or his testimony, when offered, shall be objected to as irrelevant, the objections shall be heard and determined by the justice.

History. Acts 1873, No. 135, §§ 28, 29, p. 430; C. & M. Dig., §§ 6436, 6437; Pope’s Dig., §§ 8398, 8399; A.S.A. 1947, §§ 26-613, 26-614.

16-19-609. Examination of adversary -- Effect of refusal to submit to examination — Application on appeal.

(a) Either party may examine the other on oath and for that purpose may cause him to be summoned to attend the trial if he resides in the county or, if he resides out of the county, may file written interrogatories with the court or magistrate before whom the trial is to be had, together with an affidavit that he believes the answers to them are necessary to his obtaining justice, and cause a copy of the interrogatories to be delivered to the party required to answer them, who shall make out, swear to, and file with the court or magistrate, on or before the day of trial, a plain, direct response to the interrogatories, which may be read by either party.

(b) The court shall render judgment against the party who refuses to attend and be examined, when summoned two (2) days before trial, or to make proper responses to interrogatories when a copy has been delivered to him three (3) days before the trial, when he resides within fifty (50) miles of the place of trial, and one (1) additional day for every thirty (30) miles he may reside therefrom. However, the court may grant further time for attending or answering.

(c) Subsections (a) and (b) of this section shall apply to circuit courts upon the trial of appeals from judgments of justices of the peace.

History. Acts 1873, No. 135, §§ 30-32, Dig., §§ 8400-8402; A.S.A. 1947, §§ 26-p. 430; C. & M. Dig., §§ 6438-6440; Pope's 616 — 26-618.

RESEARCH REFERENCES

Ark. L. Rev. Adverse Party as a Witness, 17 Ark. L. Rev. 136.

16-19-610. Witness and juror attendance and mileage fees.

(a) The quorum court of any county may, by a majority vote of the members thereof, fix the fees payable to witnesses and jurors for attendance or service in the justice of the peace court at any sum not to exceed five dollars (\$5.00) per day.

(b)(1) Witnesses subpoenaed to attend a justice's court outside of their own county as provided in § 16-19-501 shall have the same mileage and per diem for attending such courts as is provided by law in like cases in the circuit court.

(2) They shall have the same right to demand and receive their mileage and per diem in advance as is provided by law for witnesses subpoenaed to attend the circuit court.

History. Acts 1893, No. 171, § 4, p. 301; C. & M. Dig., § 6407; Pope's Dig., § 8369; Acts 1959, No. 71, § 1; A.S.A. 1947, §§ 26-615, 26-622.

Cross References. Witness fees, § 16-43-801 et seq.

16-19-611. Verdict — Entry on docket.

(a) The jurors must all agree to the verdict.

(b) When the jurors shall have agreed upon their verdict, they shall deliver the verdict to the justice publicly, who shall enter it on his docket.

History. Acts 1873, No. 135, §§ 27, 33, Dig., §§ 8397, 8403; A.S.A. 1947, §§ 26-p. 430; C. & M. Dig., §§ 6435, 6441; Pope's 612, 26-619.

16-19-612. Failure of jury to agree — Retrial.

Whenever a justice is satisfied that a jury sworn in a cause before him, after having been out a reasonable time, cannot agree on their verdict, he may discharge them and shall immediately issue a new summons for another to appear, at a time therein fixed, not more than three (3) days distant, unless the parties consent that the justice may render judgment upon the evidence already before him, which he may do in that case, or unless they consent that the new trial, upon a new hearing of the evidence to be adduced by the parties, shall be by the justice.

History. Acts 1873, No. 135, § 34, p. 430; C. & M. Dig., § 6442; Pope's Dig., § 8404; A.S.A. 1947, § 26-620.

CASE NOTES**Continuance.**

Jurisdiction of the subject matter is not lost by continuance beyond three days.

Wheeler & Wilson Manufacturing Co. v. Donahoe, 49 Ark. 318, 5 S.W. 342 (1887).

16-19-613. New trial granted on motion — Exception.

A new trial or rehearing may be granted by a justice of the peace, except on trial by jury, upon motion made within ten (10) days after a judgment or final order has been made or rendered. Notice of the motion shall be given to the opposite party. However, no motion for a new trial or a rehearing in a cause tried by a jury shall be entertained by a justice of the peace.

History. Acts 1873, No. 135, § 41, p. 430; C. & M. Dig., §§ 6449, 6450; Pope's Dig., §§ 8411, 8412; A.S.A. 1947, § 26-621.

CASE NOTES**ANALYSIS**

Appeal after new trial granted.
Correction of errors.

Appeal after New Trial Granted.

Where a defendant asked for a new trial in a justice's court which was granted and

the case was set for retrial and subsequently the defendant withdrew his application for a new trial and prayed an appeal to the circuit court which was granted, the effect of the proceedings was to leave the original judgment in force and the circuit court acquired jurisdiction on

appeal. *Cathey v. Brown*, 70 Ark. 348, 68 S.W. 31 (1902).

Correction of Errors.

While a justice of the peace has power to set aside a void judgment or to quash void process and an appeal will lie from his judgment either granting or refusing that

relief, he has no power to modify or change the judgment or to grant a rehearing for the correction of errors after ten days from the rendition of the judgment. *Betterton v. Anderson*, 171 Ark. 74, 283 S.W. 364 (1926).

SUBCHAPTER 7 — DISMISSAL, DEFAULT, ETC.

- SECTION.
- 16-19-701. Dismissal for want of prosecution generally.
- 16-19-702. Judgment on proof on defendant's nonappearance generally.
- 16-19-703. Actions founded on written instruments liquidating the claim of the plaintiff — Ef-

- SECTION.
- fect of failure of parties to appear.
- 16-19-704. Setoff on written instrument.
- 16-19-705. Setting aside judgment by default or dismissal for want of prosecution.
- 16-19-706. Compromises — Confession of judgment.

Effective Dates. Acts 1873, No. 135, § 127: effective on passage.

16-19-701. Dismissal for want of prosecution generally.

If the plaintiff fails to appear in person, or by his agent or attorney, on the return day of the summons, or at any other time fixed for the trial, the justice may dismiss the action for want of prosecution, except in the case provided for in § 16-19-703(a).

History. Acts 1873, No. 135, § 35, p. 430; C. & M. Dig., § 6443; Pope's Dig., § 8405; A.S.A. 1947, § 26-801.

CASE NOTES

Appeal.

Where judgment by default was rendered by a justice of the peace since, on day of trial, the plaintiffs as well as the defendants failed to appear, the plaintiffs should have been nonsuited and this error might have been corrected by appeal. *Shaver & Son v. Shell*, 24 Ark. 122 (1863).

Where a justice of the peace in a garnishment proceeding determined that an

interpleader was entitled to the fund garnished as against the plaintiff, the justice could not, by dismissing the plaintiff's motion for want of jurisdiction, prevent the plaintiff from taking an appeal, unless the plaintiff first moved to set aside the judgment of the justice. *Ellis v. Citizens State Bank*, 178 Ark. 191, 10 S.W.2d 8 (1928).

16-19-702. Judgment on proof on defendant's nonappearance generally.

When the plaintiff's claim is not founded on a written instrument as described in § 16-19-703(a) and the defendant does not appear, the justice shall proceed to hear the allegations and proofs of the plaintiff, and shall render judgment thereon for the amount to which he shows himself entitled, not exceeding the amount claimed in the action.

History. Acts 1873, No. 135, § 38, p. 430; C. & M. Dig., § 6446; Pope's Dig., § 8408; A.S.A. 1947, § 26-804.

16-19-703. Actions founded on written instruments liquidating the claim of the plaintiff — Effect of failure of parties to appear.

(a) When the suit is founded on an instrument of writing purporting to have been executed by the defendant, in which the demand of the plaintiff is liquidated, and if the signature of the defendant is not denied under oath, and if the instrument has been filed with the justice of the peace previous to the day for appearance, he may proceed with the cause, whether the plaintiff appears or not. The instrument of writing shall be competent proof in the case.

(b) In the case provided for in subsection (a) of this section, if the defendant does not appear in obedience to the summons, judgment shall be rendered against him for the amount of the plaintiff's claim.

History. Acts 1873, No. 135, §§ 36, 37, p. 430; C. & M. Dig., §§ 6444, 6445; Pope's Dig., §§ 8406, 8407; A.S.A. 1947, §§ 26-802, 26-803.

16-19-704. Setoff on written instrument.

In the cases contemplated in §§ 16-19-702 and 16-19-703(b), if the defendant has previously filed a setoff, founded on a written instrument purporting to have been signed by the plaintiff, calling for a certain sum, and if the signature of such plaintiff is not denied under oath, the justice shall allow the setoff in the same manner as if the defendant had appeared and shall render judgment accordingly.

History. Acts 1873, No. 135, § 39, p. 430; C. & M. Dig., § 6447; Pope's Dig., § 8409; A.S.A. 1947, § 26-805.

16-19-705. Setting aside judgment by default or dismissal for want of prosecution.

A judgment of dismissal for want of prosecution, or judgment by default, may be set aside by the justice at any time within ten (10) days after being rendered if the party applying therefor can show a satisfactory excuse for his default, and a meritorious cause of action or meritorious defense. Upon such a showing of a satisfactory excuse for

default and a meritorious cause of action or defense, a new day shall be fixed for trial, and notice shall be given to the opposite party, and any execution which may in the meantime have been issued shall be recalled in the same manner as in cases of appeal. The cause shall proceed to trial as though no such judgment had been taken.

History. Acts 1873, No. 135, § 40, p. 430; C. & M. Dig., § 6448; Pope's Dig., § 8410; A.S.A. 1947, § 26-806.

CASE NOTES

ANALYSIS

Applicability.
Remedies.
Trial fee.

Applicability.

This section does not apply where the parties appeared and had trial. *Carroll v. Texport Oil Co.*, 148 Ark. 18, 228 S.W. 390 (1921).

Remedies.

There are three remedies against default judgment: motion to set aside, ap-

peal to circuit court, and certiorari when appeal lost without fault of appellant. *Twin City Bank v. J.S. McWilliams Auto. Co.*, 182 Ark. 1086, 34 S.W.2d 229 (1931).

Trial Fee.

A justice of the peace is entitled to a trial fee even if the case goes by default. *Reigler v. Quinn*, 54 Ark. 37, 14 S.W. 1103 (1890).

16-19-706. Compromises — Confession of judgment.

(a) After an action for the recovery of money is brought in a justice of the peace court, the defendant may offer to compromise or to confess judgment in the manner prescribed for, and with the same effect as he could or might do, in the circuit court, and shall be entitled to all the benefits to be derived therefrom to the same extent as on similar proceedings in the circuit court.

(b) The rules and proceedings governing confessions of judgment, as they may apply to the circuit courts, are made to apply to justice of the peace courts.

History. Acts 1873, No. 135, §§ 52, 121, p. 430; C. & M. Dig., § 6461; Pope's Dig., §§ 8423, 8463; A.S.A. 1947, §§ 26-407, 26-807.

Cross References. Agreed cases, § 16-118-101.

CASE NOTES

ANALYSIS

Evidence of appearance.
Judgment for interpleader.

Evidence of Appearance.

When an entry of a judgment by confession in the docket of a justice does not

show, except by inference, that the defendant personally appeared in the justice court, as provided by law, and where it is shown by parol testimony that defendant did not appear, the judgment against him will be void. *Smith v. Finley*, 52 Ark. 373, 12 S.W. 782 (1889).

Judgment for Interpleader.

A judgment entered by the justice of the peace in favor of an interpleader in an attachment suit containing a recital that the plaintiff's attorney "acknowledged judgment for the property" will not, on appeal, be treated as a judgment by con-

fession where the plaintiff's attorney resisted the interplea, and no authority is shown to have been possessed by him to confess judgment on behalf of the plaintiff. *Jansen v. Strayhorn*, 59 Ark. 330, 27 S.W. 230 (1894).

SUBCHAPTER 8 — JUDGMENT

SECTION.

16-19-801. Mutual judgments.

16-19-802. Remittitur.

Effective Dates. Acts 1873, No. 135,
§ 127: effective on passage.

16-19-801. Mutual judgments.

(a) Mutual judgments between the same parties rendered by the same or different justices of the peace may be set off against each other.

(b) When judgments are rendered by the same court, the justice shall strike the balance as it appears from the judgments on his docket and shall issue executions therefor in favor of the party to whom the balance appears to be due.

(c)(1) If the judgment proposed to be set off was rendered by another justice of the peace, the party offering it must obtain a transcript thereof, with a certificate of the justice of the peace who rendered it endorsed thereon, stating that no appeal has been taken and that the transcript was obtained for the purpose of being used as a setoff in that case. However, the transcript shall not be given until the time for taking an appeal has elapsed.

(2) The justice so giving a transcript shall make an entry in his docket, and all other proceedings in his court shall be stayed.

(3)(A) When the transcript is presented to the justice who has rendered a judgment between the same parties, as aforesaid, if execution has not been issued on the judgment rendered by him, he shall strike a balance between the judgments and issue execution for such balance.

(B) If, at the time of filing the transcript, execution has already been issued, the justice of the peace shall also issue execution on the transcript filed with him, and deliver it to the same officer who has the other execution. Such officer shall treat the lesser execution as so much cash collected on the larger and proceed to collect the balance then found due.

(4)(A) When the judgment is allowed to be set off, as provided in this section, the transcript thereof shall be filed among the papers of the case in which it is so used and the proper entry made in the docket of the justice of the peace.

(B) However, if the justice of the peace refuses the judgment as a setoff, he shall so certify on the transcript and return it to the party who offered it. When the transcript is filed in the office of the justice of the peace who gave it, proceedings may be held by him in the same manner as if no such transcript had been certified by him.

(d) The costs in suits where mutual judgments have been obtained shall not be set off unless the balance of cash actually collected on the larger judgment be sufficient to pay the costs of both judgments, and such cost shall be paid therefrom accordingly.

History. Acts 1873, No. 135, §§ 44-51, Dig., §§ 8415-8422; A.S.A. 1947, §§ 26-p. 430; C. & M. Dig., §§ 6453-6460; Pope's 903 — 26-910.

16-19-802. Remittitur.

If any sum is found in favor of a party, either by verdict of a jury or upon a hearing of the cause before a justice, exceeding the sum for which the justice is authorized to give judgment, the party may remit and release the excess and take judgment for the residue, but shall never thereafter be allowed to institute any suit for the recovery of the excess so remitted and released.

History. Acts 1873, No. 135, § 55, p. 430; C. & M. Dig., § 6462; Pope's Dig., § 8424; A.S.A. 1947, § 26-911.

SUBCHAPTER 9 — STAY OF EXECUTION

SECTION.

- 16-19-901. Stay of execution generally.
- 16-19-902. Cases in which no stay to be allowed.
- 16-19-903. Bond.
- 16-19-904. Agreed period of stay.
- 16-19-905. Stayed judgment lien on personal property.
- 16-19-906. Revocation of execution.

SECTION.

- 16-19-907. Immediate issuance of execution to prevent fraud.
- 16-19-908. Execution issued where bond insufficient.
- 16-19-909. Failure to satisfy judgment — Levy against principal and security — Judgment for bail.

Effective Dates. Acts 1873, No. 135, § 127: effective on passage.

Acts 1889, No. 66, § 4: effective on passage.

Acts 1899, No. 29, § 3: effective on passage.

16-19-901. Stay of execution generally.

The execution from a judgment rendered by a justice of the peace may be stayed in the manner and form as provided in this subchapter.

History. Acts 1873, No. 135, § 56, p. 430; 1889, No. 66, § 3, p. 82; 1899, No. 29, § 1, p. 37; C. & M. Dig., § 6466; Pope's Dig., § 8428; A.S.A. 1947, § 26-1001.

16-19-902. Cases in which no stay to be allowed.

No stay shall be allowed against any collecting officer, or attorney at law or agent, for a delinquency or default in executing or discharging the duties of his office or place or for failing to pay over money collected by him in such capacity, or against a principal by his surety on a stay bond or otherwise, or on a judgment for specific property, or for the property or its value. In the cases mentioned in this section in which a stay is not allowed, the justice of the peace shall note the same on his docket on the day of the rendition thereof.

History. Acts 1873, No. 135, § 67, p. 430; C. & M. Dig., § 6477; Pope's Dig., § 8439; A.S.A. 1947, § 26-1012.

16-19-903. Bond.

(a) To entitle any person to a stay of execution, some responsible person, to be approved by the justice of the peace, who is not a party to the judgment, must enter into an obligation before the justice of the peace to the adverse party, in a sum sufficient to secure the payment of the judgment, conditioned that the obligation shall be void on payment of the judgment at the expiration of the stay.

(b) The obligation must be signed by the party entering into it, must be attested by the justice of the peace before whom it may be taken, and shall have the same force and effect as a judgment rendered by a justice of the peace.

(c) The bond may be in the following form:

"I, acknowledge myself indebted to in the sum of dollars, to be void upon this condition:

Whereas, obtained a judgment before, a justice of the peace of township, in the County of, on the day of, 19...., against Now, if such judgment shall be paid at the expiration of months from the time it was rendered, this obligation shall be void.

Approved:

....., J.P."

(d) The justice shall file the obligation among the papers in the case and make a note in his docket of the day and date thereof.

(e) The stay of execution in all sums under the jurisdiction of the court shall be for six (6) months from the rendition of the judgment.

History. Acts 1873, No. 135, §§ 58, 59, Dig., §§ 6468, 6469; Pope's Dig., §§ 8430, p. 430; 1899, No. 29, § 2, p. 37; C. & M. 8431; A.S.A. 1947, §§ 26-1002, 26-1004.

16-19-904. Agreed period of stay.

If all the parties agree upon any other period, the stay shall be for the time so agreed upon.

History. Acts 1873, No. 135, § 57, p. 430; C. & M. Dig., § 6467; Pope's Dig., § 8429; A.S.A. 1947, § 26-1003.

16-19-905. Stayed judgment lien on personal property.

In all cases where execution is stayed on any judgment rendered by a justice of the peace under the provisions of this subchapter, the judgment shall be a lien upon all the personal property subject to execution belonging to the defendant at the time of the rendition of the judgment.

History. Acts 1873, No. 135, § 62, p. 430; C. & M. Dig., § 6472; Pope's Dig., § 8434; A.S.A. 1947, § 26-1007.

CASE NOTES**Limitation of Lien.**

The lien is confined to defendant's personal property in the township in which

the judgment was rendered. *Carroll v. Gillespie & Bro.*, 41 Ark. 468 (1883).

16-19-906. Revocation of execution.

If a judgment is stayed in the manner prescribed in this subchapter after an execution shall have been issued thereon, the justice of the peace shall revoke the execution in the same manner and with like effect as he is directed to revoke an execution after an appeal has been allowed.

History. Acts 1873, No. 135, § 66, p. 430; C. & M. Dig., § 6476; Pope's Dig., § 8438; A.S.A. 1947, § 26-1011.

CASE NOTES

Cited: *McBride v. Mullinix*, 299 F. 162 (8th Cir. 1924).

16-19-907. Immediate issuance of execution to prevent fraud.

If the plaintiff or his agent makes an oath before the justice of the peace rendering the judgment that he has reason to believe that the defendant is secreting his property or is putting it out of his hands for the purpose of defrauding his just creditors and that he verily believes the debt will be lost if execution is not immediately issued, the justice of the peace shall immediately issue execution on such judgment.

History. Acts 1873, No. 135, § 60, p. 430; C. & M. Dig., § 6470; Pope's Dig., § 8432; A.S.A. 1947, § 26-1005.

16-19-908. Execution issued where bond insufficient.

If any plaintiff, in any judgment rendered before a justice of the peace upon which execution has been stayed, satisfies the justice of the peace before whom an obligation for the stay may have been entered into, by affidavit or by evidence, that the obligation or the security therein is insufficient and that unless execution be immediately issued on such judgment he will be in danger of losing his debt, the justice of the peace shall immediately issue execution regardless of the stay.

History. Acts 1873, No. 135, § 61, p. 430; C. & M. Dig., § 6471; Pope's Dig., § 8433; A.S.A. 1947, § 26-1006.

16-19-909. Failure to satisfy judgment — Levy against principal and security — Judgment for bail.

(a) If at the expiration of the stay, any judgment is not paid, the execution shall be issued against both principal and security.

(b)(1) If the principal does not satisfy the execution, and the officer cannot find sufficient property belonging to him upon which to levy, he shall levy upon the property of the bail, and in his return shall state what amount of the money collected by him on the execution was collected from the bail and the time the money was received.

(2)(A) After the return of the execution, the bail shall be entitled, upon motion, to a judgment before the justice of the peace for the amount collected from him in satisfaction of the execution, with interest thereon at the rate of ten percent (10%) per annum. The return of the officer shall be evidence of the amount of money paid by the bail.

(B) No such motion shall be made after the expiration of four (4) months from the return day of the execution.

History. Acts 1873, No. 135, §§ 63-65, p. 430; C. & M. Dig., §§ 6473-6475; Pope's Dig., §§ 8435-8437; A.S.A. 1947, §§ 26-1008 — 26-1010.

SUBCHAPTER 10 — EXECUTION, LEVY, AND SALE

SECTION.

- 16-19-1001. Issuance generally.
- 16-19-1002. Issuance of execution — Time limitations.
- 16-19-1003. Execution by other than regular justice.
- 16-19-1004. Issuance against goods and chattels — Real estate exempt.

SECTION.

- 16-19-1005. Levy outside of township.
- 16-19-1006. Renewal of execution upon return unsatisfied.
- 16-19-1007. Remedy of claimant of property levied upon.
- 16-19-1008. Sale of goods and chattels levied upon — Notice.
- 16-19-1009. Return of execution.

SECTION.

16-19-1010. Payment of judgment to constable or justice of the peace — Recovery by party entitled.

SECTION.

16-19-1011. Suing out execution in circuit court — Procedure — Effect.

Effective Dates. Acts 1873, No. 135, § 127: effective on passage.

Acts 1941, No. 333, § 3: approved Mar. 26, 1941. Emergency clause provided: "Many causes of action are now pending before various courts of this state and this

act being necessary for the immediate preservation of the public peace, health, and safety, an emergency is hereby declared to exist and this act shall be in full force and effect from and after its passage."

16-19-1001. Issuance generally.

(a) Upon every judgment rendered by a justice of the peace, execution shall be issued by the justice of the peace in the manner prescribed in this subchapter, at any time on demand, unless the execution has been stayed.

(b) The execution shall be directed to any constable of the county.

(c) The execution must be dated, as on the day on which it is issued and made returnable within thirty (30) days thereafter, and may be substantially in the form used in the circuit court.

(d) Before any execution shall be delivered, the justice of the peace shall state in his docket and also on the back of the execution an account of debt, damages, and costs and of the fees due to each person separately, and the officer receiving the execution shall endorse thereon the time of receiving the execution.

History. Acts 1873, No. 135, §§ 54, 70, 76, p. 430; C. & M. Dig., §§ 6482, 6483; Pope's Dig., §§ 8444, 8445; A.S.A. 1947, §§ 26-1102, 26-1103, 26-1105n.

CASE NOTES

Recall.

A justice has control of an improper or improvident execution issued by him, and

may recall and quash it. *Scanland v. Mixer*, 34 Ark. 354 (1879); *Dunnagan v. Shaffer*, 48 Ark. 476, 3 S.W. 522 (1886).

16-19-1002. Issuance of execution — Time limitations.

Executions for the enforcement of judgments in a justice of the peace court, except when filed in the clerk's office of the circuit court of the county in which the judgment was rendered, may be issued by the justice of the peace before whom judgment was rendered on the application of the party entitled thereto at any time within five (5) years from the entry of the judgment, but not afterwards.

History. Acts 1873, No. 135, § 53, p. 430; C. & M. Dig., § 6481; Pope's Dig., § 8443; A.S.A. 1947, § 26-1101.

CASE NOTES

ANALYSIS

Applicability.
Revival of judgment.

Applicability.

The five-year limitation on issuance of execution on judgment does not apply to suits on judgment which may be brought at any time within the limitation prescribed by § 16-56-114. A. Karcher Candy

Co. v. Hopkins, 211 Ark. 810, 202 S.W.2d 588 (1947).

Revival of Judgment.

No execution can be issued after five years from the rendition of the judgment, and there can be no revivor of the judgment by scire facias or any of the modes peculiar to courts of superior jurisdiction. Trammell v. Anderson, 52 Ark. 176, 12 S.W. 328 (1889).

16-19-1003. Execution by other than regular justice.

(a) Whenever a justice of the peace in any township in any county in this state, before whom a judgment has been obtained and upon whose docket the judgment appears against any person or persons, is absent from his office so that he cannot be found or has resigned or died and no successor been appointed, or when there is a judgment on the docket against the justice of the peace, it shall be the duty of any other qualified and acting justice of the peace in the township, or in the county, at the request of the plaintiff and the judgment, or at the request of the plaintiff's attorney or agent, or of the constable or other officer having the collection of the judgment, to issue an execution upon the judgment against the party against whom the judgment was obtained, and the same proceedings shall be had thereon as are prescribed by law.

(b)(1) In order to carry out the provisions of subsection (a) of this section, it shall be the duty of every justice of the peace before whom a judgment has been obtained, whenever he is about to be absent from the township or county for more than ten (10) days, or has resigned and his successor has not been appointed, to deposit his docket or to cause his docket to be deposited with the nearest justice of the peace in his township or county.

(2) When the docket has been so deposited, it shall be lawful for the justice of the peace with whom the docket is deposited, upon application as provided in subsection (a) of this section, to issue an execution upon any judgment which appears unsatisfied upon the docket against any person or persons.

(c) It may be lawful for any justice of the peace in the same township, in the absence of the justice of the peace before whom the judgment has been obtained against any person or persons, when so requested by the persons provided for in subsection (a) of this section, after he has examined the judgment on the docket of the absent justice of the peace, to issue an execution on the judgment, as provided for in this section.

(d) When such other justice of the peace as contemplated in this section shall issue an execution upon a judgment rendered upon the docket of another justice of the peace, the execution shall be in the following form:

"County of

The State of Arkansas to any constable of the township of, greetings:

Whereas, it appears from an examination of the docket of, a justice of the peace in and for the township of, in the County of, in the State of Arkansas, that, on the day of, 19....., obtained judgment before said justice against for dollars for his debt (or damages) and dollars for his damages, and also dollars for his costs; and, whereas, an execution has been ordered out on said judgment by said (or his attorney, agent, or constable, charged with the collection of the same, as the case may be), which judgment bears interest at the rate of percent on debt and damages from its date. You are therefore commanded to levy the same on the goods and chattels of the said according to law. You are further commanded to return this writ to the undersigned justice, on the day of, 19.....

Given under my hand this day of, 19.....

....., J.P."

(e) The execution shall be directed to the constable of the township where the justice of the peace resides, unless when it is otherwise specially provided, shall be dated on the day it is issued, and shall be made returnable in thirty (30) days after its issuance.

History. Acts 1873, No. 135, §§ 71-75, Dig., §§ 8447-8450; A.S.A. 1947, §§ 26-p. 430; C. & M. Dig., §§ 6485-6488; Pope's 1105 — 26-1107, 26-1107n, 26-1108.

16-19-1004. Issuance against goods and chattels — Real estate exempt.

(a) The execution shall be against the goods and chattels of the person against whom the execution is issued.

(b) No real estate shall be levied upon or sold by virtue of any execution issued from a justice of the peace court.

History. Acts 1873, No. 135, §§ 54, Pope's Dig., §§ 8444, 8457; A.S.A. 1947, 122, p. 430; C. & M. Dig., §§ 6482, 6495; §§ 26-1102, 26-1115.

16-19-1005. Levy outside of township.

In case the defendant resides outside of the township where the judgment was rendered, or does not have sufficient goods and chattels therein to satisfy the judgment, the constable to whom the execution is directed may levy the execution upon the goods and chattels of the defendant in any township in the county where the defendant resides and where his goods and chattels may be found.

History. Acts 1873, No. 135, § 77, p. 430; C. & M. Dig., § 6484; Pope's Dig., § 8446; A.S.A. 1947, § 26-1104.

16-19-1006. Renewal of execution upon return unsatisfied.

(a) On executions issued and returned not satisfied, it shall be the duty of the justice of the peace to renew all such executions by endorsing the renewal on such executions to that effect, signed by him and dated when the renewal is made.

(b) Every such endorsement shall renew the execution in full force, in all respects for twelve (12) months and no longer.

(c) An entry of the renewal shall be made in the docket of the justice. However, execution so docketed shall be subject to be acted upon at any time at the instance of the plaintiff in all such cases as provided for.

(d) If part of the execution has been satisfied, the endorsement of renewal shall express the sum due on the execution.

History. Acts 1873, No. 135, §§ 78-80, Dig., §§ 8451-8453; A.S.A. 1947, §§ 26-430; C. & M. Dig., §§ 6489-6491; Pope's 1109 — 26-1111.

CASE NOTES**Lien.**

An execution constitutes a lien from the time of issuance and levy and continues as

a lien during the period of its renewal. McCabe v. Lee, 123 Ark. 82, 184 S.W. 448 (1916).

16-19-1007. Remedy of claimant of property levied upon.

No trial of the right to any property levied upon by a constable or justice of the peace shall be had before the constable. However, this section shall not bar the claimant of the property of his right to bring replevin therefor in the court having jurisdiction to try the action.

History. Acts 1873, No. 135, § 123, p. 430; C. & M. Dig., § 6500; Pope's Dig., § 8462; A.S.A. 1947, § 26-1116.

16-19-1008. Sale of goods and chattels levied upon — Notice.

(a) The constable, after taking goods and chattels into his custody, by virtue of an execution, shall without delay give public notice by at least three (3) advertisements posted in three (3) public places in the township, of the time when and place where they will be exposed to sale. The notice shall describe the goods and chattels taken and shall be posted at least ten (10) days before the day of sale.

(b) At the time and place so appointed, if the goods and chattels are present for the inspection of bidders, the officer shall expose the goods and chattels for sale at public vendue, for cash in hand.

(c) No constable or other officer shall directly or indirectly purchase any goods or chattels at any sale made by him upon execution. Every such sale shall be absolutely void.

History. Acts 1873, No. 135, §§ 81, 82, Pope's Dig., §§ 8454, 8455; A.S.A. 1947, §§ 26-430; C. & M. Dig., §§ 6492, 6493; §§ 26-1112, 26-1113, 26-1120.

CASE NOTES

ANALYSIS

Authority of justice.
Exhibition of goods.

Authority of Justice.

A justice has no authority to set aside a sale under execution; if the sale is void, the property is to be levied upon and sold again, but the justice has the authority, for legal cause, to quash an execution and

its return, issued by him, thereby removing the only legal obstacle to another levy and sale. *Dunnagan v. Shaffer*, 48 Ark. 476, 3 S.W. 522 (1886).

Exhibition of Goods.

Unless the merchandise on which execution has been levied is exhibited at a sheriff's sale, the sale is void. *Kennedy & Co. v. Clayton*, 29 Ark. 270 (1874).

16-19-1009. Return of execution.

The constable shall return the execution and have the money before the justice of the peace at the time of making the return, ready to be paid over to the persons respectively entitled to the money.

History. Acts 1873, No. 135, § 83, p. 430; C. & M. Dig., § 6494; Pope's Dig., § 8456; A.S.A. 1947, § 26-1114.

Cross References. Procedure when execution is returned unsatisfied, § 16-66-417.

16-19-1010. Payment of judgment to constable or justice of the peace — Recovery by party entitled.

(a)(1) The constable of the township shall receive all money that may be tendered to him in payment of any judgment obtained before a justice of the peace of the township and shall give the person paying the money a receipt therefor. The receipt shall specify on what account the money was paid.

(2) The payment shall be valid against the judgment and, upon the production to the justice of the peace of the receipt therefor, shall be credited thereon.

(b) No payment of money upon a judgment made to a justice of the peace, either before or after execution thereon, shall be valid against the judgment, nor shall the justice of the peace be authorized or empowered to collect and receipt for the money.

(c) The person entitled to the money paid shall have the same remedies against the constable and his securities for the recovery thereof as if the money had been collected by the constable on execution.

History. Acts 1873, No. 135, §§ 85-87, Pope's Dig., §§ 8458, 8460, 8461; A.S.A. p. 430; C. & M. Dig., §§ 6496, 6498, 6499; 1947, §§ 26-1117 — 26-1119.

16-19-1011. Suing out execution in circuit court — Procedure — Effect.

(a)(1) Every justice of the peace, on the demand of any person in whose favor he has rendered judgment for more than ten dollars (\$10.00), exclusive of costs, shall, upon payment of costs thereon, give to that person a certified copy of the judgment.

(2) The clerk of the circuit court of the same county in which the judgment was rendered, upon the production of any such transcript, shall file the transcript in his office and forthwith enter the judgment in the docket of the circuit court for judgments and decrees, and shall note therein the time of filing the transcript.

(b) The transcript may be filed, and execution may be sued out of the circuit court on the judgment, without an execution having been issued by the justice of the peace.

(c) Every such judgment, from the time of filing the transcript thereof, shall be a lien on the real estate of the defendant in the county, to the same extent as a judgment of the circuit court of the same county, and shall be carried into execution in the same manner and with like effect as the judgments of the circuit courts.

History. Acts 1873, No. 135, §§ 68, 69, p. 430; C. & M. Dig., §§ 6478-6480; Pope's Dig., §§ 8440-8442; Acts 1941, No. 333, § 1; A.S.A. 1947, §§ 26-1121 — 26-1123.

Publisher's Notes. This section may be affected by AICR, Rule 8.

CASE NOTES

ANALYSIS

Limitation.

Priority.

Subsequently acquired land.

Limitation.

Where commissioner of revenues obtained judgment on certificate of indebtedness for gasoline taxes but did not procure a writ of scire facias or execution to collect or preserve its judgment within statute of limitation, the right of the state to claim a lien was barred. *Lion Oil Ref. Co. v. Rex Oil Co.*, 195 Ark. 1021, 115 S.W.2d 556 (1938).

Priority.

Certificate of assessment for unpaid unemployment compensation taxes acquired status of judgment when filed in circuit court in accordance with § 11-10-718 and constituted a lien on debtor's realty which was superior to federal government's lien for taxes under former 26 U.S.C. § 3670, where state's lien was first in point of time and there was no allegation of insolvency to bring into play the former federal priority statute, 31 U.S.C. § 191. *Commercial Credit Corp. v. Schwartz*, 130 F. Supp. 524 (E.D. Ark. 1955).

Subsequently Acquired Land.

A judgment from a justice of the peace court, when filed in the office of the clerk of the circuit court, becomes a lien on the real estate of the defendant, including land acquired after judgment, even though the clerk may neglect to enter the judgment in the docket of the circuit court. *Petray v. Howell*, 20 Ark. 615 (1859) (decision under prior law).

Where a judgment is obtained in the court of a justice of the peace and a transcript of the judgment is subsequently filed in the office of the circuit clerk, that judgment becomes a lien on land subsequently acquired by the judgment debtor by inheritance, and the lien cannot be displaced by the debtor's subsequently moving to the land and occupying it as a homestead. *Cazort & McGehee Co. v. Byars*, 104 Ark. 637, 150 S.W. 109 (1912).

Cited: *Saint Louis & S.F.R.R. v. Bowman*, 76 Ark. 32, 88 S.W. 1033 (1905); *Smith v. Watkins*, 187 Ark. 852, 62 S.W.2d 41 (1933); *McGehee Bank v. Charles W. Greeson & Sons*, 223 Ark. 18, 263 S.W.2d 901 (1954); *Thornbrough v. Mayner*, 236 Ark. 480, 366 S.W.2d 889 (1963); *Farm Serv. Coop. v. Goshen Farms, Inc.*, 267 Ark. 324, 590 S.W.2d 861 (1979).

SUBCHAPTER 11 — APPEAL

SECTION.

- 16-19-1101. Rule and attachment —
Compelling justice of the
peace to allow appeal.
- 16-19-1102. Rule and attachment —
Compelling return of pro-
ceedings by justice of the
peace.
- 16-19-1103. Amendment of return.
- 16-19-1104. Securing or correcting bond
after allowance of appeal

SECTION.

- No dismissal for want of
bond.
- 16-19-1105. Trial on appeal.
- 16-19-1106. Dismissal or failure to prose-
cute appeal — Effect.
- 16-19-1107. Judgment on appeal and pro-
ceedings thereon.
- 16-19-1108. Satisfaction of judgment by
security — Judgment for
amount paid — Interest.

Effective Dates. Acts 1873, No. 135,
§ 127: effective on passage.

16-19-1101. Rule and attachment — Compelling justice of the peace to allow appeal.

If a justice of the peace fails to allow an appeal in a cause where the appeal ought to be allowed, the circuit court or the judge thereof in vacation, on such facts appearing satisfactorily, may by rule and attachment compel the justice of the peace to allow the appeal, and return the record of his proceedings in the suit, together with the papers required to be returned by him.

History. Acts 1873, No. 135, § 106, p. 430; C. & M. Dig., § 6522; Pope's Dig., § 8484; A.S.A. 1947, § 26-1312.

16-19-1102. Rule and attachment — Compelling return of proceedings by justice of the peace.

Upon the appeal being made and allowed, the circuit court may by rule and attachment compel a return by the justice of the peace of the record of his proceedings in the suit and of the papers required to be returned by him.

History. Acts 1873, No. 135, § 105, p. 430; C. & M. Dig., § 6521; Pope's Dig., § 8483; A.S.A. 1947, § 26-1311.

16-19-1103. Amendment of return.

Whenever the court is satisfied that the return of the record of the proceedings of the justice of the peace is substantially defective, the court may by rule and attachment compel him to amend the return.

History. Acts 1873, No. 135, § 107, p. 430; C. & M. Dig., § 6523; Pope's Dig., § 8485; A.S.A. 1947, § 26-1313.

16-19-1104. Securing or correcting bond after allowance of appeal — No dismissal for want of bond.

No appeal allowed by a justice of the peace shall be dismissed because there is no bond or obligation or because the bond or obligation given is defective if the appellant, before the motion to dismiss is determined, enters before the circuit court into such obligation as he ought to have entered into before the allowance of the appeal and pays all costs that shall be incurred by reason of such defect or omission. However, any person appealing without bond and a suspension of the proceedings in the justice of the peace courts shall not be required to enter into bond before the circuit court, as required in this section.

History. Acts 1873, No. 135, § 108, p. 430; C. & M. Dig., § 6524; Pope's Dig., § 8486; A.S.A. 1947, § 26-1314.

16-19-1105. Trial on appeal.

(a) Upon the return of the justice of the peace being filed in the clerk's office, the court shall be in possession of the cause and shall proceed to hear, try, and determine the cause anew on its merits, without any regard to any error, defect, or other imperfection in the proceedings of the justice of the peace.

(b) The same cause of action, and no other, that was tried before the justice of the peace shall be tried in the circuit court upon the appeal.

(c) No setoff shall be pleaded that was not pleaded before the justice of the peace if the summons was served on the person of the defendant.

History. Acts 1873, No. 135, §§ 102, 113, p. 430; C. & M. Dig., §§ 6518, 6529; Pope's Dig., §§ 8480, 8491; A.S.A. 1947, §§ 26-1308, 26-1319.

CASE NOTES

ANALYSIS

Applicability.

Altering charge.

Amendments.

Counterclaim and setoff.

Defect.

Dismissal.

Judgment.

Jury trial.

Representation by counsel.

Standing.

Statute of limitations.

Applicability.

While this section speaks to appeals

from decisions of justices of the peace, it applies to appeals from municipal court misdemeanor convictions. *Casoli v. State*, 297 Ark. 491, 763 S.W.2d 650 (1989); *Bussey v. State*, 315 Ark. 292, 867 S.W.2d 433 (1993).

This section provides for de novo appeals from municipal courts to circuit courts. *Johnson v. State*, 312 Ark. 38, 846 S.W.2d 662 (1993).

Pursuant to Const. Art. 7, §§ 14 and 33, and the circuit court has subject matter jurisdiction to hear attorney's appeal of the fee awarded in municipal court. *Johnson v. State*, 312 Ark. 38, 846 S.W.2d 662 (1993).

Altering Charge.

Municipal court erred and prejudiced defendant charged with driving while intoxicated (DWI) when it changed the charge to driving under the influence (DUI) on its own motion, because DUI is not a lesser-included offense of DWI and altering the charge violated § 5-65-107; and the circuit court erred in trying and convicting defendant of DUI following his appeal from the municipal court, a judgment it was not authorized to render under this section. *McElhanon v. State*, 329 Ark. 261, 948 S.W.2d 89 (1997).

Amendments.

The circuit court may permit amendments and allow new issues to be made, while keeping clear of new causes of action and setoffs not presented in the court below. *Texas & St. L. Ry. v. Hall*, 44 Ark. 375 (1884); *Birmingham v. Rogers*, 46 Ark. 254 (1885); *Greer v. Joyce*, 138 Ark. 98, 210 S.W. 344 (1919).

Counterclaim and Setoff.

This section expressly excludes the right to present either a counterclaim or setoff in the circuit court on appeal where none was presented before the justice of the peace from whose judgment the appeal comes. *McDaniel v. Jonesboro Trust Co.*, 127 Ark. 61, 191 S.W. 916 (1917); *Greer v. Joyce*, 138 Ark. 98, 210 S.W. 344 (1919); *Upton v. Robison*, 179 Ark. 600, 17 S.W.2d 305 (1929).

Defect.

The circuit court may disregard or cure by amendment any defect which the justice might have cured. *Saint Louis, I.M. & S. Ry. v. Lindsay*, 55 Ark. 281, 18 S.W. 59 (1892).

Dismissal.

Dismissal of appeal leaves judgment appealed from in force. *Burgess v. Poole*, 45 Ark. 373 (1885).

Judgment.

On appeal, the circuit court can render no judgment that the justice could not have rendered. *Whitesides v. Kershaw &*

Driggs, 44 Ark. 377 (1884); *Townsend v. State*, 292 Ark. 157, 728 S.W.2d 516 (1987).

The circuit court cannot render judgment for an amount exceeding jurisdiction of justice. *Norman v. Fife*, 61 Ark. 33, 31 S.W. 740 (1895) See *Belding v. Sloan*, 65 Ark. 175, 45 S.W. 245 (1898).

On appeal from a justice of the peace, the circuit court acquires such jurisdiction as the justice had and can render only such judgment upon the pleadings and proof as the justice could or should have rendered. *Woolverton v. Freeman*, 77 Ark. 234, 91 S.W. 190 (1905).

Jury Trial.

Since a case is tried anew on appeal to the circuit court, defendant was entitled to jury trial in circuit court on appeal from conviction and fine for violating municipal speeding ordinance. *Johnston v. City of Pine Bluff*, 258 Ark. 346, 525 S.W.2d 76 (1975).

Representation by Counsel.

Failure to assign counsel to an indigent defendant in a misdemeanor case in the justice of the peace court does not deprive that defendant of his constitutional rights where, upon appeal to the circuit court, the cause is tried de novo and the defendant is represented by counsel. *Cableton v. State*, 243 Ark. 351, 420 S.W.2d 534 (1967).

Standing.

Default judgment against one railroad company could not be appealed from by another railroad company claiming to be aggrieved thereby. *Chicago, R.I. & Pac. Ry. v. Young*, 85 Ark. 444, 108 S.W. 831 (1908).

Statute of Limitations.

Defendant may plead the statute of limitations in the circuit court for the first time. *Meddock v. Williams*, 91 Ark. 93, 120 S.W. 842 (1909).

Cited: *Swift & Co. v. Cox*, 138 Ark. 606, 212 S.W. 83 (1919); *Rockefeller v. Hogue*, 246 Ark. 712, 439 S.W.2d 805 (1969); *Cox v. Farrell*, 292 Ark. 177, 728 S.W.2d 954 (1987).

16-19-1106. Dismissal or failure to prosecute appeal — Effect.

If the party appealing moves to dismiss in the circuit court or fails to prosecute his appeal, it shall be at the option of the appellee either to proceed to trial on the appeal or have judgment rendered for the amount of the original judgment and costs where it was in his favor or in bar of the original judgment where it was against him.

History. Acts 1873, No. 135, § 114, p. 430; C. & M. Dig., § 6530; Pope's Dig., § 8492; A.S.A. 1947, § 26-1320.

16-19-1107. Judgment on appeal and proceedings thereon.

In all cases of appeal from a justice of the peace, if the judgment of the justice of the peace is affirmed or if on the new trial in the circuit court the judgment is against the appellant, the judgment shall be rendered against the appellant and his securities in the bond or obligation for the appeal.

History. Acts 1873, No. 135, § 115, p. 430; C. & M. Dig., § 6531; Pope's Dig., § 8493; A.S.A. 1947, § 26-1321.

Cross References. Retention of jurisdiction by circuit court until final judgment, § 16-67-206.

CASE NOTES**Liability of Sureties.**

Where the circuit court affirmed the judgment of the justice of the peace and directed the defendant to restore the property levied on or account for its value, the plaintiff was not entitled to summary judgment for the amount of the judgment rendered for him on the defendant's appeal bond since the appeal was not from the money judgment of the justice of the peace but was from the order of the justice allowing the claim of exemption, and the sureties were liable only for the satisfaction which the plaintiff would have obtained had the bond not been executed and the property then released. *Peel & Co. v. Mooney*, 162 Ark. 344, 258 S.W. 366 (1924).

Where the judgment against the appellant omits the sureties, a nunc pro tunc judgment may be rendered against them at a subsequent term. *Burgener v. Spooner*, 167 Ark. 316, 268 S.W. 6 (1925).

By executing an appeal bond, a surety makes himself a party to the proceeding and, therefore, is constructively present at every step of the litigation and must be deemed to have notice of all the orders made and to have assumed all the obligations imposed by law upon a surety. *Judd v. Wilson*, 182 Ark. 729, 32 S.W.2d 614 (1930).

Cited: *T.J. Moss Tie Co. v. Miller*, 169 Ark. 657, 276 S.W. 586 (1925).

16-19-1108. Satisfaction of judgment by security — Judgment for amount paid — Interest.

(a) After the return of an execution, satisfied in whole or in part out of the property of a security, the security shall be entitled to a judgment, upon motion, against the principal for the amount so paid by the security, together with interest thereon at the rate of ten percent (10%) per annum from the time of payment.

(b) The motion must be made within one (1) year after the return day of execution, and the return of the officer shall be evidence upon the hearing of the motion of the facts stated therein.

History. Acts 1873, No. 135, §§ 117, Pope’s Dig., §§ 8495, 8496; A.S.A. 1947, 118, p. 430; C. & M. Dig., §§ 6533, 6534; §§ 26-1323, 26-1324.

CHAPTER 20
CLERKS OF COURT

SUBCHAPTER.

- 1. GENERAL PROVISIONS.
- 2. SUPREME COURT CLERK.
- 3. CIRCUIT AND CHANCERY CLERKS.
- 4. COUNTY AND PROBATE CLERKS.

RESEARCH REFERENCES

ALR. Applicability of judicial immunity to acts of clerk of court under state law. 34 ALR 4th 1186.

Am. Jur. 15A Am. Jur. 2d, Clerks of Ct., § 1 et seq.

Ark. L. Rev. Administration of the Courts in Arkansas: Challenge, Performance, and Prospects, 30 Ark. L. Rev. 235.

C.J.S. 21 C.J.S., Courts., § 236 et seq.

SUBCHAPTER 1 — GENERAL PROVISIONS

SECTION.

- 16-20-101. Endorsement of papers.
- 16-20-102. Docket entries.
- 16-20-103. Oaths and affidavits.
- 16-20-104. Bonds.
- 16-20-105. County and Circuit Clerks Continuing Education Board.
- 16-20-106. Fines, penalties, taxes, etc. — Collection and settlement

SECTION.

- Accounting — Audit and adjustment.
- 16-20-107. [Repealed.]
- 16-20-108. Investment of moneys held in trust — Disposition of funds.
- 16-20-109. Facsimile copies transmitted as pleadings.

Publisher’s Notes. Acts 1887, No. 46, § 1, provided that all official acts of any deputy clerk of any court of record in the state, done and performed theretofore when the deputy was under the age of twenty-one (21) years, were legalized and made as valid and binding as though the deputy had been of full and lawful age at the time the official acts were performed.

Cross References. Clerks not to act as attorney, § 16-22-210.

Settlement of moneys collected by clerks, § 26-39-201 et seq.

Effective Dates. Acts 1883, No. 114, § 226: effective on passage.

Acts 1981 (Ex. Sess.), No. 16, § 12: Nov. 25, 1981. Emergency clause provided: “It is hereby found and determined that some of the provisions of Act 824 of 1981, which provides that the official court reporters of the circuit and chancery courts in the State are state employees, and provide for the levy and collection of additional court costs to pay the salaries and expenses of reporters, are vague and difficult to interpret, and that it is essential to the effec-

tive and efficient administration of justice that this Act be given effect immediately to clarify the law relating to court reporters. Therefore, an emergency is hereby declared to exist and this Act being necessary for the immediate preservation of the public peace, health and safety shall be in full force and effect from and after its passage and approval."

Acts 1991, No. 404, § 5: Mar. 8, 1991. Emergency clause provided: "It is hereby found and determined by the Seventy-Eighth General Assembly that state law does not provide for the deposit of trust funds held by the probate clerk in interest bearing accounts; that this act is necessary to clarify that such deposit of trust funds is in the best interests of all parties involved. Therefore, an emergency is hereby declared to exist and this act being necessary for the immediate preservation

of the public peace, health and safety shall be in full force and effect from and after its passage and approval."

Acts 1995, No. 986, § 5: Apr. 6, 1995. Emergency clause provided: "It is hereby found and determined by the Eightieth General Assembly of the State of Arkansas that the County and Circuit Clerks Continuing Education Board is made up of only five (5) members; that small number of the members needs to be increased to better represent all 75 counties, and all areas and regions of the State of Arkansas; and that expanding the Board's membership will solve this problem in an immediate fashion. Therefore, an emergency is hereby declared to exist, and this act being necessary for the immediate preservation of the public peace, health, and safety, shall be in full force and effect from and after its passage and approval."

16-20-101. Endorsement of papers.

The clerk shall endorse, upon every paper filed in an action, the day it was filed; he shall endorse upon every order for a provisional remedy, and upon every bond taken thereunder, the day of its return to his office.

History. Civil Code, § 770; C. & M. Dig., § 1375; Pope's Dig., § 1636; A.S.A. 1947, § 23-101.

16-20-102. Docket entries.

Upon the return of every summons served, the clerk shall enter upon the docket the name of the defendant or defendants summoned and the day of the service upon each one. The entry shall be evidence of the service of summons in case of the loss thereof.

History. Civil Code, § 771; C. & M. Dig., § 1376; Pope's Dig., § 1637; A.S.A. 1947, § 23-102.

16-20-103. Oaths and affidavits.

The clerk may administer any oath or take any affidavit required or permitted in the progress of an action.

History. Civil Code, § 772; C. & M. Dig., § 1377; Pope's Dig., § 1638; A.S.A. 1947, § 23-103.

16-20-104. Bonds.

(a) The clerk shall prepare, in a proper manner, every bond to be taken by or given before him or his court.

(b) He shall refuse any surety offered in a bond to be taken by him who is, in his opinion, insufficient.

History. Civil Code, §§ 773, 774; C. & §§ 1639, 1640; A.S.A. 1947, §§ 23-104, M. Dig., §§ 1378, 1379; Pope's Dig., 23-105.

16-20-105. County and Circuit Clerks Continuing Education Board.

(a) There is created the County and Circuit Clerks Continuing Education Board which shall be composed of the following nine (9) members:

(1) Three (3) members of the County Clerks' Association, designated by the County Clerks' Association;

(2) Three (3) members of the Circuit Clerks' Association, designated by the Circuit Clerks' Association;

(3) One (1) combined county and circuit clerk to be designated by each of the two (2) associations named in subdivisions (a)(1) and (2) of this section, on a rotating basis annually;

(4) The Auditor of State or a person designated by him; and

(5) One (1) member designated by the Association of Arkansas Counties.

(b)(1) It shall be the responsibility of the County and Circuit Clerks Continuing Education Board to establish a continuing education program for county clerks and circuit clerks of the various counties in the state.

(2) The program shall be designed to better equip persons elected to serve as county clerks and circuit clerks to carry out their official responsibilities in an effective and efficient manner. The program shall include requirements and procedures for an effective certification program for county clerks and circuit clerks.

(c) It shall also be the responsibility of the board to disburse any funds made available to it from the County and Circuit Clerks Continuing Education Fund and to establish and maintain a continuing education program and a certification program for county and circuit clerks.

History. Acts 1983, No. 914, §§ 1, 2; A.S.A. 1947, §§ 23-421, 23-422; Acts 1995, No. 986, § 1.

A.C.R.C. Notes. As originally amended by Acts 1995, No. 986, § 1, subdivision (a)(3) ended: "beginning with the County Clerks' Association, and then on a rotating basis annually."

Amendments. The 1995 amendment substituted "nine (9) members" for "five (5) members" in (a); substituted "Three (3) members" for "Two (2) members" in (a)(1) and (2); inserted (a)(3), redesignating former (a)(3) as (a)(4); and added (a)(5).

16-20-106. Fines, penalties, taxes, etc. — Collection and settlement — Accounting — Audit and adjustment.

(a) The clerks of the several courts of record of this state shall collect and pay over to the treasurer of their respective counties all taxes due on writs, executions, and official seals. They shall also collect and pay over other sums of money, by whatever name designated, coming to their hands and belonging to the state or county.

(b) The clerks of the several courts of record of the state shall render account at each term of their respective courts, verified by oath, of all moneys which have been received to the use of the state or county not before accounted for.

(c)(1) The clerks shall keep a true account of all fines, penalties, forfeitures, and judgments imposed, adjudged, or rendered in favor of the state or any county by their respective courts, distinguishing those payable to the state from those payable to the county.

(2) The clerks shall keep the account open to the inspection of the judges of the respective courts and the members of the grand jury.

(d) It shall be the duty of the judges of such courts to audit and adjust the accounts of their respective clerks, according to the records, dockets, and papers of their respective courts, and to make two (2) separate bills of the several sums, wherewith their clerks shall be chargeable, specifying on what account the bill is payable. The judges shall certify a copy thereof to the clerk of the county court, who shall file and charge the bill accordingly. The copy shall be certified and delivered to the county treasurer.

History. Acts 1883, No. 114, §§ 179-181, p. 199; C. & M. Dig., §§ 10141-10143; Pope's Dig., §§ 13923-13925; A.S.A. 1947, §§ 23-107 — 23-109.

CASE NOTES**ANALYSIS**

Forced settlement.
Setting off.

Forced Settlement.

If the circuit court neglects to require the circuit clerk to report during the term of his office, the county court may force him to settle. *Lee County v. Abrahams*, 31 Ark. 571 (1876) (decision under prior law).

Setting Off.

The circuit clerk cannot set off allowances made him by the county court against the amount of taxes in his hands. *Lee County v. Govan*, 31 Ark. 610 (1876) (decision under prior law).

16-20-107. [Repealed.]

Publisher's Notes. This section, concerning collection and payment of additional fees and use of funds, was repealed by Acts 1995, No. 1256, § 20, as amended

by Acts 1995 (1st Ex. Sess.), No. 13, § 4. The section was derived from Acts 1981 (Ex. Sess.), No. 16, § 3; A.S.A. 1947, § 22-156.

16-20-108. Investment of moneys held in trust — Disposition of funds.

- (a) Moneys received by a clerk of the circuit, chancery, or probate court to be held by the clerk in trust shall hereafter be invested by the clerk in an interest-bearing account, unless a court with proper jurisdiction over the fund orders otherwise.
- (b) The interest earned by such account shall be paid over to the general fund of the county, in the absence of an order to the contrary from a court of competent jurisdiction.

History. Acts 1981, No. 279, § 1; A.S.A. 1947, § 23-112; Acts 1991, No. 404, § 1.

16-20-109. Facsimile copies transmitted as pleadings.

- (a) Any court clerk of a court of record may accept facsimile copies transmitted over telephone lines for filing as pleadings in cases, provided such pleadings are transmitted onto bond-type paper which can be preserved for a period of at least ten (10) years.
- (b) Any signature appearing on a facsimile copy of a court pleading shall be presumed to be authentic until proven otherwise.
- (c)(1) A facsimile copy of a court pleading shall be deemed received and filed by the court clerk when it is transmitted to the proper office and received on the court clerk’s facsimile machine without regard to the hours of operation of the clerk’s office.
- (2) The date and time printed by the court clerk’s facsimile machine on the transmitted copy of a court pleading shall be prima facie evidence of the date and time of the filing until proven otherwise.

History. Acts 1989, No. 58, § 1; 1989 (3rd Ex. Sess.), No. 19, § 1; 1997, No. 874, § 1.
Amendments. The 1997 amendment rewrote (a); and inserted “to the proper

office” following “transmitted” in the first sentence in (c).
Cross References. Service and filings of pleading and other papers, ARCP 5.

RESEARCH REFERENCES

Ark. L. Notes. Watkins, Procedural Notes from All Over, 1989 Ark. L. Notes 65.	UALR L.J. Survey, Civil Procedure, 12 UALR L.J. 603.
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CASE NOTES

Construction.
Document with date and time affixed by the court clerk’s facsimile machine, but not separately file-stamped by the clerk, held timely, despite the literal interpretation of RAP-Civ 4 and 5 requiring otherwise. *Bhatti v. McCabe*, 326 Ark. 176, 928 S.W.2d 340 (1996).

SUBCHAPTER 2 — SUPREME COURT CLERK

SECTION.

16-20-201. Bond.

16-20-202. Preservation of seal and property of office — Office supplies and equipment.

16-20-203. Recording of judgments and opinions.

16-20-204. Issuance of process.

SECTION.

16-20-205. Acknowledgments taken — Oaths administered.

16-20-206. Copies of opinions to be furnished to Reporter of the Supreme Court.

16-20-207. Fees — Accounting — Audit.

Cross References. Appointment, Ark. Const., Art. 7, § 7.

Effective Dates. Acts 1895, No. 145, § 9: effective on passage.

Acts 1937, No. 22, § 2: effective on passage.

16-20-201. Bond.

(a) The Clerk of the Supreme Court shall, before he enters on the duties of his office, enter into bond to the state in any sum not less than three thousand dollars (\$3,000), with good and sufficient security. The bond shall be approved by the court in term time, or by either of the justices thereof in vacation, conditioned upon the faithful discharge of his office, that he will seasonably record the judgments, decrees, orders, and proceedings of the court, and do and perform all other things that may be required of him by law, and that he, his executors, or administrators will deliver to his successor, safe and undefaced, all books, papers, records, seals, and furniture belonging to his office. The bond shall be filed in the office of the Secretary of State.

(b) The Clerk of the Supreme Court shall be liable on his official bond for the acts of his deputies in the discharge of their duties as such.

History. Rev. Stat., ch. 26, § 2; Acts 1895, No. 145, § 6, p. 213; C. & M. Dig., §§ 1351, 1356; Pope's Dig., §§ 1608, 1613; A.S.A. 1947, §§ 23-201, 23-205.

A.C.R.C. Notes. The operation of subsection (a) of this section was suspended by adoption of a self-insured fidelity bond

program for public officers, officials and employees, effective July 20, 1987, pursuant to § 21-2-701 et seq. The subsection may again become effective upon cessation of coverage under that program. See § 21-2-703.

16-20-202. Preservation of seal and property of office — Office supplies and equipment.

The Clerk of the Supreme Court shall preserve the seals and other property belonging to the office and shall provide suitable books, stationery, furniture, and such other things as may be necessary for the office and the courts.

History. Rev. Stat., ch. 26, § 3; C. & M. Dig., § 1352; Pope's Dig., § 1609; A.S.A. 1947, § 23-202; Acts 1995, No. 549, § 4.

Amendments. The 1995 amendment rewrote this section.

16-20-203. Recording of judgments and opinions.

It shall be the duty of the Clerk of the Supreme Court to record the judgments, decrees, rules, orders, proceedings, and opinions of the courts and a complete alphabetical index to all the Clerk of the Supreme Court's books of record.

History. Rev. Stat., ch. 26, § 4; C. & M. Dig., § 1353; Pope's Dig., § 1610; A.S.A. 1947, § 23-206; Acts 1995, No. 549, § 5.

Amendments. The 1995 amendment rewrote this section.

16-20-204. Issuance of process.

The Clerk of the Supreme Court shall issue and attest all process and affix the seals of the courts thereto.

History. Rev. Stat., ch. 26, § 5; C. & M. Dig., § 1354; Pope's Dig., § 1611; A.S.A. 1947, § 23-209; Acts 1995, No. 549, § 6.

Amendments. The 1995 amendment rewrote this section.

16-20-205. Acknowledgments taken — Oaths administered.

The Clerk of the Supreme Court and the Clerk of the Supreme Court's deputies shall have authority to take acknowledgments to deeds, mortgages, and other instruments and to administer oaths.

History. Acts 1937, No. 22, § 1; Pope's Dig., § 1614; A.S.A. 1947, § 23-210; Acts 1995, No. 549, § 7.

Amendments. The 1995 amendment rewrote this section.

16-20-206. Copies of opinions to be furnished to Reporter of the Supreme Court.

The Clerk of the Supreme Court shall furnish to the Reporter of the Supreme Court the names of counsel signing briefs and a true copy of the opinions of the courts in all cases.

History. Rev. Stat., ch. 127, §§ 5, 6; C. & M. Dig., §§ 1357, 1358; Acts 1925, No. 357, § 1; Pope's Dig., §§ 1615, 1619, 13328; A.S.A. 1947, §§ 23-207, 23-208; Acts 1995, No. 549, § 8.

Amendments. The 1995 amendment rewrote this section.

Cross References. Time copy of decisions to be furnished to the Reporter of the Supreme Court, § 16-11-201.

16-20-207. Fees — Accounting — Audit.

The Clerk of the Supreme Court shall keep a true and accurate account of all fees earned in the office in accordance with the guidelines as required by law, and such records shall be subject to inspection by the Auditor of State.

History. Acts 1895, No. 145, §§ 2-5, p. 213; C. & M. Dig., §§ 1359-1362; Pope's Dig., §§ 1620-1623; A.S.A. 1947, §§ 23-211 — 23-214; Acts 1995, No. 549, § 9.

Amendments. The 1995 amendment rewrote this section.

Cross References. Fees, § 21-6-401.

SUBCHAPTER 3 — CIRCUIT AND CHANCERY CLERKS

SECTION.

- 16-20-301. Preservation of seal and property of office — Office supplies and equipment.
- 16-20-302. Issuance and attestation of processes.
- 16-20-303. List of causes to be tried — Issuance of subpoenas — Penalty for noncompliance.
- 16-20-304. Record and index of court proceedings.
- 16-20-305. Authority to remove records.
- 16-20-306. Masters or commissioners — Procedure.

SECTION.

- 16-20-307. Account and settlement of arrearages accruing to county or state.
- 16-20-308. Resignation, removal, or death — Delivery of records to successor.
- 16-20-309. Resignation, removal, or death — Settlement of accounts.
- 16-20-310. Charges against or indictment of clerk — Proceedings — Removal.

Publisher's Notes. Section 14-14-1301(a)(2), in part, provides that the clerk of the circuit court shall be ex officio clerk of the county and probate courts, and recorder. However, § 14-14-1301(a)(2) and (a)(3) also provide, in part, that a county clerk may be elected in the same manner as the clerk of the circuit court,

and, in such cases, the county clerk shall be ex officio clerk of the probate court of the county until otherwise provided by the General Assembly.

Cross References. Fees, §§ 21-6-402, 21-6-403.

Supreme Court reports, custody and responsibility, § 25-18-214.

16-20-301. Preservation of seal and property of office — Office supplies and equipment.

Each clerk shall preserve the seal and other property belonging to his office and shall provide suitable books, stationery, furniture, and other things necessary for his office.

History. Rev. Stat., ch. 25, § 8; C. & M. Dig., § 1371; Pope's Dig., § 1632; A.S.A. 1947, § 23-307.

CASE NOTES

Authority to Purchase.

The circuit clerk is authorized to purchase a typewriter under this section.

Madison County v. Simpson, 173 Ark. 755, 293 S.W. 34 (1927).

16-20-302. Issuance and attestation of processes.

Every clerk shall seasonably issue and attest all processes when required by law.

History. Rev. Stat., ch. 25, § 11; C. & M. Dig., § 1374; Pope's Dig., § 1635; A.S.A. 1947, § 23-315.

CASE NOTES

Cited: Edens v. State, 258 Ark. 734, 528 S.W.2d 416 (1975).

16-20-303. List of causes to be tried — Issuance of subpoenas — Penalty for noncompliance.

(a)(1) The several clerks of the circuit courts shall, within twenty (20) days before the commencement of each term of the court, make out a docket of all causes, both civil and criminal, in which an issue of fact is to be tried, an inquiry of damages to be made, a special verdict, agreed case, demurrer, or other matter of law, to be argued at such term.

(2) The clerk shall arrange such causes or indictments upon the docket in the same order in which the original process was issued. However, all criminal matters shall be first set down. A proper portion of the causes shall be set for each day the term is supposed to continue.

(b) Every clerk, within the time specified in subdivision (a)(1) of this section, shall post in some convenient place in his office a list of all causes specified in subdivision (a)(1) of this section, distinguishing therein the day on which each cause is to be tried. He shall keep such list so affixed until the end of such term, for the inspection of the parties litigant, and their attorneys.

(c) Every clerk of the circuit court, upon the demand of any party or his attorney and upon the payment of the legal fee therefor, shall issue subpoenas for witnesses to appear and testify on the day for which the cause is set in which the subpoenas are demanded.

(d) Every clerk who neglects or refuses to make out the docket or to set and keep up such lists of causes, or to issue subpoenas according to the provisions of this section, shall, on motion, be fined by the court in any sum not exceeding one hundred dollars (\$100).

History. Rev. Stat., ch. 116, §§ 144, Dig., §§ 1641, 1642; A.S.A. 1947, §§ 23-145; C. & M. Dig., §§ 1380, 1381; Pope's 316, 23-317.

16-20-304. Record and index of court proceedings.

Every clerk shall seasonably record the judgments, rules, orders, and other proceedings of the courts of which he is the clerk and shall make a complete alphabetical index thereto.

History. Rev. Stat., ch. 25, § 11; C. & M. Dig., § 1374; Pope's Dig., § 1635; A.S.A. 1947, § 23-315.

Cross References. Records to contain judgment debtor's social security number, § 16-65-122.

CASE NOTES

Cited: Edens v. State, 258 Ark. 734, 528 S.W.2d 416 (1975).

16-20-305. Authority to remove records.

In case of danger from an invading enemy, the clerk may remove the records, papers, and other things belonging to his office to some secure place until the danger ceases.

History. Rev. Stat., ch. 25, § 10; C. & M. Dig., § 1373; Pope's Dig., § 1634; A.S.A. 1947, § 23-308.

16-20-306. Masters or commissioners — Procedure.

(a) The circuit clerk, by virtue of his office, shall be master or commissioner of the circuit court, shall have all the powers that are conferred by law on a master or commissioner in chancery, and shall receive for such services a compensation to be fixed by the court. However, the judge may, for reasons or causes, appoint and constitute any other person master or commissioner in special causes in the court.

(b) In all such proceedings had before the clerk, the same pleadings and proofs shall be required and had as though the proceedings were had before the court.

(c) At the next term of the court held thereafter, the judge shall examine all bonds taken by the clerk in vacation and make such orders relating to the bonds as he shall deem necessary and proper for the security of the parties interested therein.

History. Acts 1873, No. 53, § 7, p. 113; C. & M. Dig., §§ 1364, 1365; Pope's Dig., §§ 1625, 1626; A.S.A. 1947, § 23-314.

CASE NOTES

Appointment in Vacation.

Appointment of special master by chancellor in vacation is valid under this sec-

tion. *Fidelity & Deposit Co. v. Cunningham*, 181 Ark. 954, 28 S.W.2d 715 (1930).

16-20-307. Account and settlement of arrearages accruing to county or state.

Every clerk shall keep a perfect account of all arrearages coming into his hands and accruing to the county or state on account of taxes, fines, or otherwise. He shall then make settlement with the proper court at each stated term and pay over all balances.

History. Rev. Stat., ch. 25, § 11; C. & M. Dig., § 1374; Pope's Dig., § 1635; A.S.A. 1947, § 23-315.

CASE NOTES

Cited: Edens v. State, 258 Ark. 734, 528 S.W.2d 416 (1975).

16-20-308. Resignation, removal, or death — Delivery of records to successor.

If any clerk of the circuit court resigns, is removed from office, or dies, he or his executors or administrators shall deliver all records, papers, books, files, seals, and other things belonging to his office to his successor, as soon as he is qualified, who shall take charge of and make receipt for those items.

History. Rev. Stat., ch. 25, § 19; C. & M. Dig., § 1382; Pope's Dig., § 1643; A.S.A. 1947, § 23-318. **Cross References.** Delivery of records to successor, § 21-12-401.

CASE NOTES

Cited: Edens v. State, 258 Ark. 734, 528 S.W.2d 416 (1975).

16-20-309. Resignation, removal, or death — Settlement of accounts.

(a) Any clerk who resigns or is removed from office, or the executor or administrator of any clerk who dies, shall render a perfect account to the proper court, at the next term after the death, resignation, or removal. This account, on oath, shall be made of all arrearages of moneys received by him by virtue of his office, not previously accounted for, and shall settle with the court as if the clerk were still in office.

(b) For this purpose, free access may be had to the office and the records, books, papers, and files therein.

(c) The court may compel such settlement and enforce the payment of any balance by attachment.

History. Rev. Stat., ch. 25, § 20; C. & M. Dig., § 1383; Pope's Dig., § 1644; A.S.A. 1947, § 23-319.

16-20-310. Charges against or indictment of clerk — Proceedings — Removal.

(a)(1) When any prosecuting attorney is required to prosecute charges against any clerk, if the offense is indictable, the prosecuting attorney shall submit the charges to the grand jury, in order that an indictment may be found.

(2)(A) If the charges are for an offense not indictable, the prosecuting attorney shall make the charges out and file them in the court. He shall cause a copy thereof to be served on the clerk, together with a notice requiring him to appear before the circuit court of the county in which the clerk may reside, on some specified day in the term, and answer the charges.

(B) The notice and copy of the charges shall be delivered to the clerk at least fifteen (15) days before the day appointed for the answering thereof.

(b)(1) The prosecuting attorney shall cause witnesses to be summoned to support such charges or any indictment that may have been found against the clerk and shall prosecute the charges or indictment with speed.

(2) The clerk shall appear and plead at the next term of the court unless further time is given for that purpose.

(3) If the clerk pleads not guilty to the charges or indictment, the court shall require a jury to be summoned to try the issue joined.

(4) If the jury finds the clerk guilty, or if he pleads guilty to the charges or indictment, it shall be the duty of the court to enter up an order removing the clerk from office. From that time he shall cease to be clerk of such court, and the vacancy shall be filled according to law.

History. Rev. Stat., ch. 25, §§ 15-18; C. §§ 1648-1651; A.S.A. 1947, §§ 23-322 — & M. Dig., §§ 1387-1390; Pope's Dig., 23-325.

SUBCHAPTER 4 — COUNTY AND PROBATE CLERKS

SECTION.

16-20-401. Duties of clerk generally — Fees.

16-20-402. Duties as to accounts.

16-20-403. [Repealed.]

16-20-404. Fee for making settlement with collector.

SECTION.

16-20-405. [Repealed.]

16-20-406. Receipts for papers filed with clerk of circuit court.

Publisher's Notes. Section 14-14-1301(a)(2) provides, in part, that the clerk of the circuit court shall be ex officio clerk of the county and probate courts, and recorder. However, § 14-14-1301(a)(2) and (a)(3) also provide, in part, that a county clerk may be elected in the same manner as the clerk of the circuit court, and, in such cases, the county clerk shall be ex officio clerk of the probate court of the county until otherwise provided by the General Assembly.

Cross References. Fees, § 21-6-406.

Records to be kept when two judicial districts, § 14-15-901.

Effective Dates. Acts 1873, No. 31, § 30: effective on passage.

Acts 1935, No. 170, § 12: Mar. 21, 1935. Emergency clause provided: "Whereas the status of the tax forfeiture laws of this state are such as to encourage tax delinquencies and has greatly decreased the efficient operation of the schools and various governmental functions, now, therefore, an emergency is declared and this Act being necessary for the immediate preservation of the public peace, health, and safety, it shall become effective immediately upon its passage and approval."

16-20-401. Duties of clerk generally — Fees.

(a) The county clerk shall, by virtue of his office, be clerk of the county court for his county.

(b) It shall be his duty to attend each regular or special session of the court, either in person or by deputy, and to keep and preserve in his office a complete and correct record of the proceedings of the court.

History. Acts 1873, No. 31, § 5, p. 53;
C. & M. Dig., § 1392; Pope's Dig., § 1653;
A.S.A. 1947, § 23-405.

16-20-402. Duties as to accounts.

It shall be the duty of the clerk of the county court of each county:

(1) To keep a regular account between the treasurer and the county, charging him with all moneys paid into the treasury, and crediting him with the amount he may have disbursed, between the period of his respective settlements with the court;

(2) To keep just accounts between the county and all persons, bodies politic or corporate, chargeable with moneys payable into the county treasury;

(3)(A) To file and preserve in his office all documents, vouchers, and other papers pertaining to the settlement of any account to which the county shall be a party;

(B) Copies of such documents, vouchers, and papers certified under the hand and seal of such clerk shall be admitted to be read in evidence in any of the courts of this state;

(4) To issue warrants on the treasury for all moneys ordered to be paid by the court, keep an abstract thereof, and present the abstract to the county court at every regular term;

(5) To balance and exhibit the accounts kept by him as often as required by the court; and

(6) To keep his books and papers at all times ready for the inspection of the county court or the presiding judge thereof.

History. Rev. Stat., ch. 41, § 15; C. & M. Dig., §§ 1394-1398; Pope's Dig., §§ 1657-1661; A.S.A. 1947, § 23-406.

Cross References. Enforcement of Const., Amend. 10, § 14-23-107.

Fees for prosecuting cases in municipal court, § 16-17-222.

Fees generally, § 21-6-101 et seq.

Payment of funds into county treasury, § 26-39-201.

16-20-403. [Repealed.]

Publisher's Notes. This section, concerning annual financial report of clerk, was repealed by Acts 1993, No. 538, § 1. The section was derived from Acts 1935,

No. 170, §§ 11-A, 11-B; Pope's Dig., §§ 13799, 13800; Acts 1981, No. 678, § 1; A.S.A. 1947, §§ 23-408, 23-409.

16-20-404. Fee for making settlement with collector.

The clerks of the county and probate courts of the various counties in the state are authorized to charge a fee of not more than ten dollars (\$10.00) per day for making settlement with the collector for each day employed, including quarterly apportionments, but not exceeding thirty (30) days during any calendar year.

History. Acts 1963, No. 491, § 1;
A.S.A. 1947, § 23-420.

16-20-405. [Repealed.]

Publisher's Notes. This section, concerning a fiscal report to the quorum or levying court, was repealed by Acts 1995, No. 232, § 11. The section was derived from Acts 1927, No. 340, § 4; Pope's Dig., § 13827; A.S.A. 1947, § 23-407.

16-20-406. Receipts for papers filed with clerk of circuit court.

Whenever the clerk of the county and probate court shall deliver to the clerk of the circuit court any original papers, he shall take a receipt therefor and file the receipt in place of the papers.

History. Civil Code, § 22; C. & M. Dig., § 2235; Pope's Dig., § 2863; A.S.A. 1947, § 23-411.

CHAPTER 21**PROSECUTING ATTORNEYS****SUBCHAPTER.**

1. GENERAL PROVISIONS.
2. PROSECUTOR COORDINATOR ACT.
- 3-5. [RESERVED.]
6. FIRST JUDICIAL DISTRICT.
7. SECOND JUDICIAL DISTRICT.
8. THIRD JUDICIAL DISTRICT.
9. FOURTH JUDICIAL DISTRICT.
10. FIFTH JUDICIAL DISTRICT.
11. SIXTH JUDICIAL DISTRICT.
12. SEVENTH JUDICIAL DISTRICT.
13. EIGHTH JUDICIAL DISTRICT.
14. NINTH JUDICIAL DISTRICT.
15. TENTH JUDICIAL DISTRICT.
16. ELEVENTH JUDICIAL DISTRICT.
17. TWELFTH JUDICIAL DISTRICT.
18. THIRTEENTH JUDICIAL DISTRICT.
19. FOURTEENTH JUDICIAL DISTRICT.
20. FIFTEENTH JUDICIAL DISTRICT.
21. SIXTEENTH JUDICIAL DISTRICT.
22. SEVENTEENTH JUDICIAL DISTRICT.
23. EIGHTEENTH JUDICIAL DISTRICT.
24. NINETEENTH JUDICIAL DISTRICT.
25. TWENTIETH JUDICIAL DISTRICT.

SUBCHAPTER.

26. TWENTY-FIRST JUDICIAL DISTRICT. [RESERVED.]

27. TWENTY-SECOND JUDICIAL DISTRICT.

RESEARCH REFERENCES

ALR. Prosecutor's power to grant prosecution witness immunity from prosecution. 4 ALR 4th 1221.

Availability of writ of prohibition or similar remedy against acts of public prosecutor. 16 ALR 4th 112.

Enforceability of agreement not to pros-

ecute if accused would help in criminal investigation or would become witness against others. 32 ALR 4th 990.

Am. Jur. 63A Am. Jur. 2d, Pros. Attys., § 5 et seq.

C.J.S. 27 C.J.S., Dist. & Pros. Attys., § 1 et seq.

SUBCHAPTER 1 — GENERAL PROVISIONS

SECTION.

- 16-21-101. Residence.
- 16-21-102. Opinion on criminal law matters to be given to public officers.
- 16-21-103. Duty to commence and prosecute criminal actions.
- 16-21-104. Summoning witnesses before grand jury.
- 16-21-105. Justice of the peace to notify prosecutor of pendency of certain criminal proceedings — Duty of prosecutor.
- 16-21-106. Assistance to victims and witnesses of crimes — Victim of crimes case coordinator.
- 16-21-107. Victim/Witness Coordinator.
- 16-21-108. Child support enforcement — Participation in federal programs — Collection and assessment of costs.
- 16-21-109. Fees in felony cases paid to general revenue fund of county.
- 16-21-110. Report of, and payment over of, moneys received — Penalty for noncompliance.
- 16-21-111. Law library.
- 16-21-112. Prosecuting attorney pro tempore.
- 16-21-113. Deputies.
- 16-21-114. County attorneys.
- 16-21-115. City attorneys.
- 16-21-116. Indictment and punishment for misdemeanor in office or neglect of duty — Prosecution.

SECTION.

- 16-21-117. Salaries of prosecuting attorneys — Classification of judicial districts.
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- 16-21-149. Appointment of special deputy prosecuting attorneys.
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A.C.R.C. Notes. References to "this subchapter" in §§ 16-21-101 — 16-21-150 may not apply to §§ 16-21-151 — 16-21-158 which were enacted subsequently.

Effective Dates. Acts 1875 (Adj. Sess.), No. 5, § 3: effective on passage.

Acts 1893, No. 59, § 4: effective on passage.

Acts 1895, No. 80, § 5: effective on passage.

Acts 1937, No. 214, § 8: July 1, 1937.

Acts 1937, No. 286, § 7: approved Mar. 22, 1937. Emergency clause provided: "It appearing to the legislature that, without immediate legislation, the prosecuting attorney of the several judicial circuits of the State of Arkansas, will be without adequate assistants and authority to properly represent and protect the public, unless this act is made effective immediately, it is hereby declared that this act is necessary for the immediate preservation of the public peace, health and safety, and an emergency is hereby declared to exist, and this act shall take effect and be in full force, from and after its passage."

Acts 1947, No. 52, § 2: Feb. 7, 1947; Acts 1947, No. 151, § 2: Mar. 3, 1947. Emergency clauses provided: "In view of the increase in the volume of criminal cases in certain of the judicial districts of this state and in order to expedite and

facilitate the function of justice, an emergency is hereby declared to exist and it being necessary for the preservation of public peace, health, safety and welfare, this act shall take effect and be in full force from and immediately after its passage and approval."

Acts 1947, No. 152, § 2: approved Mar. 3, 1947. Emergency clause provided: "Whereas, in recent months, it is evident that crime is increasing, particularly among juvenile offenders, and whereas, it is necessary that such cases be thoroughly investigated and prepared, and whereas, the present expense account of the prosecuting attorney of the Eleventh Judicial Circuit is inadequate, now therefore, an emergency is hereby declared to exist, and this act shall be in full force and effect from and after its passage."

Acts 1947, No. 422, § 2: Mar. 28, 1947; Acts 1949, No. 213, § 2: Mar. 3, 1949; Acts 1949, No. 466, § 2: Mar. 29, 1949; Acts 1951, No. 61, §§ 2, 3: retroactive to Jan. 1, 1951. Emergency clauses provided: "It is hereby ascertained by the General Assembly that this act is necessary for the successful and efficient functioning of the judicial circuits of the State of Arkansas and that this act is necessary for the immediate preservation of the public peace, health and safety of the people of

the State of Arkansas and an emergency is hereby declared to exist; and this act shall be in full force and effect from and after its passage and approval."

Acts 1949, No. 94, § 4: approved Feb. 16, 1949. Emergency clause provided: "Whereas, in recent months, it is evident that crime is increasing, particularly among juvenile offenders, and whereas, it is necessary that such cases be thoroughly investigated and prepared, and whereas, the present expense account of the prosecuting attorney of the Tenth Judicial Circuit is inadequate, now therefore, an emergency is hereby declared to exist, and this act shall be in full force and effect from and after its passage."

Acts 1951, No. 17, § 2: approved Jan. 25, 1951. Emergency clause provided: "It appearing to the legislature that without immediate legislation, the prosecuting attorneys of the counties affected by this Act will be without adequate funds for the contingent expense of his office to properly represent and protect the public unless this Act is made effective immediately, it is hereby declared that this Act is necessary for the immediate preservation of the public peace, health and safety, and an emergency is hereby declared to exist, and this act shall take effect and be in full force from and after its passage."

Acts 1951, No. 32, § 4: approved Feb. 2, 1951. Emergency clause provided: "It appearing that the present salary and contingent expense allowed the prosecuting attorney of the Fourteenth Judicial Circuit is inadequate for the efficient and proper administration of the duties of the office, and that the expenses of such office has greatly increased within recent years, the legislature hereby declares an emergency to exist and this Act, being necessary for the immediate preservation of the public peace, health and safety, shall become effective from and after its passage."

Acts 1951, No. 61, §§ 2, 3: retroactive to Jan. 1, 1951. Emergency clause provided: "It is hereby ascertained by the General Assembly that this Act is necessary for the successful and efficient functioning of the judicial circuits of the state of Arkansas and that this Act is necessary for the immediate preservation of the public peace, health and safety of the people of the state of Arkansas and an emergency is hereby declared to exist; and this Act shall

be in full force and effect from and after its passage and approval."

Acts 1951, No. 355, § 6; 1951, No. 387, § 4: both acts approved Mar. 20, 1951. Emergency clause provided: "It appearing to the legislature that without immediate legislation, the prosecuting attorneys of the counties affected by this act will be without adequate funds for the contingent expense of his office to properly represent and protect the public, and it is hereby declared that this act is necessary for the immediate preservation of the public peace, health and safety, and an emergency is hereby declared to exist and this act shall take effect and be in full force from and after its passage."

Acts 1957, No. 420, § 4: approved Mar. 28, 1957. Emergency clause provided: "Whereas, this Act being necessary to the public peace, health and safety of the people of the state of Arkansas, and for the proper law enforcement in the 18th Judicial District, an emergency is hereby declared to exist, and this Act shall be in full force and effect from and after its passage."

Acts 1961, No. 176, § 2: Mar. 6, 1961. Emergency clause provided: "It is hereby declared by the General Assembly that recent shifts in population and recent increases of assessed valuation within the judicial circuits within the state of Arkansas have changed the classification of the Fourteenth Judicial Circuit, and the law as now in effect, does not truly reflect the pay classification of the Fourteenth Judicial Circuit; and, that only by the immediate passage of this Act may such condition be corrected. Therefore, an emergency is hereby declared to exist and this Act being necessary for the immediate preservation of the public peace, health and safety shall be in full force and effect from and after its passage and approval."

Acts 1963, No. 454, § 4: July 1, 1963.

Acts 1963, No. 486, §§ 2, 4: retroactive to Jan. 1, 1963. Emergency clause provided: "It has been found by the General Assembly of the State of Arkansas that the salaries of the prosecuting attorneys for the Fifteenth and Sixteenth Judicial Circuits are insufficient to adequately compensate the person filling those offices, and that the salaries of those offices must be increased in order to maintain efficient operation of the courts and administration of justice. Therefore, this

act being immediately necessary for the preservation of the public peace, health, and safety an emergency is declared to exist and this act shall be in force and effect from and after its passage and approval."

Acts 1965, No. 557, § 2: retroactive to Jan. 1, 1965.

Acts 1967, No. 16, § 4: Jan. 26, 1967; Acts 1973, No. 30, § 4: Jan. 31, 1973; Acts 1977, No. 117, § 6: Feb. 9, 1977; Acts 1979, No. 415, § 4: Mar. 29, 1979; Acts 1979, No. 514, § 4: Mar. 21, 1979; Acts 1981, No. 126, § 4: Feb. 19, 1981; Acts 1983, No. 5, § 4: Jan. 26, 1983. Emergency clauses provided: "It has been found and determined by the General Assembly of the State of Arkansas that due to the enormous increase in the volume of crime in the counties affected by this Act, that the sums previously appropriated are not sufficient to pay the contingency expenses of the prosecuting attorney's office. Therefore, an emergency is declared to exist, and this Act being necessary for the preservation of the public peace, health and safety, shall take effect and be in force from the date of its approval."

Acts 1967, No. 307, § 4: retroactive to Jan. 1, 1967. Emergency clause provided: "It has been found by the General Assembly of the State of Arkansas that there is an unequal classification of the various judicial circuits of this State, and in order to maintain efficient operation of the courts and administration of justice and for the preservation of the public peace, health and safety, an emergency is hereby found and declared to exist, and this Act shall be in force and effect from and after its passage and approval." Became law without Governor's signature, Mar. 13, 1967.

Acts 1967, No. 472, § 2: July 1, 1967.

Acts 1969, No. 317, § 3: became law without Governor's signature, Mar. 25, 1969. Emergency clause provided: "It is hereby found and determined by the General Assembly that the contingency expense allowed the prosecuting attorney in certain judicial circuits is inadequate for the efficient and proper administration of the duties of the office; that in order to provide proper facilities for the prosecuting attorney of Garland County, it is necessary that this Act become effective immediately. Therefore an emergency is hereby declared to exist and this Act being

necessary for the immediate preservation of the public peace, health and safety shall become effective from and after its passage and approval."

Acts 1971, No. 384, § 4: retroactive to Jan. 1, 1971. Emergency clause provided: "It is hereby found and determined by the General Assembly that the prosecuting attorneys of the various Judicial Circuits in this State are inadequately compensated; that the case load of the various Circuits has increased substantially; that this Act is indispensable to assure the efficient administration of justice in these Circuits, and it is necessary that this Act become effective from and after January 1, 1971. Therefore, an emergency is hereby declared to exist and this Act, being necessary for the immediate preservation of the public peace, health and safety, shall be in full force and effect upon passage and approval and shall be retroactive to January 1, 1971."

Acts 1971, No. 430, §§ 2, 3: retroactive to Jan. 1, 1971. Emergency clause provided: "It is hereby found and determined by the General Assembly that the amount paid to the contingent expense fund of the prosecuting attorney in certain counties of this State is inadequate and must be increased immediately in order to assure proper and efficient administration of justice in such counties. Therefore, an emergency is hereby declared to exist and this Act being necessary for the immediate preservation of the public peace, health and safety shall be in effect from and after the date of its passage and approval."

Acts 1973, No. 779, § 4: July 1, 1973. Emergency clause provided: "It is hereby found and determined by the General Assembly that the Prosecuting Attorneys of the various Judicial Circuits in this State are inadequately compensated; that the case load of the various Circuits has increased substantially; that this Act is indispensable to assure the efficient administration of justice in these Circuits, and it is necessary that this Act become effective from and after July 1, 1973. Therefore, an emergency is hereby declared to exist and this Act, being necessary for the immediate preservation of the public peace, health and safety, shall be in full force and effect upon passage and approval." Approved April 16, 1973.

Acts 1975, No. 898, § 7: Apr. 7, 1975; Acts 1977, No. 319, § 5: Mar. 1, 1977; Acts

1979, No. 447, § 5: Mar. 21, 1979. Emergency clause provided: "It is hereby found and determined by the General Assembly that the prosecuting attorneys of the various judicial districts in this State are inadequately compensated; that the caseload of the various circuits has increased substantially; that this Act is indispensable to assure the efficient administration of justice in these circuits. Therefore, an emergency is hereby declared to exist and this Act, being necessary for the immediate preservation of the public peace, health and safety, shall be in full force and effect upon passage and approval."

Acts 1977, No. 439, § 7: July 1, 1977. Emergency clause provided: "It is hereby found and determined by the Seventy-First General Assembly that the Constitution of the State of Arkansas prohibits the appropriation of funds for more than a two (2) year period; that the effectiveness of this Act on July 1, 1977 is essential to the operation of the agency for which the appropriations in this Act are provided, and that in the event of an extension of the Regular Session, the delay in the effective date of this Act beyond July 1, 1977, could work irreparable harm upon the proper administration and providing of essential governmental programs. Therefore, an emergency is hereby declared to exist, and this Act being necessary for the immediate preservation of the public peace, health, and safety shall be in full force and effect from and after July 1, 1977."

Acts 1977, No. 565, § 6: became law without Governor's signature, Mar. 21, 1977. Emergency clause provided: "It is hereby found and determined by the General Assembly of the State of Arkansas that there is no practical means now in existence for the enforcement of collection of child support payments; that as a result many families are forced to accept Aid to Families with Dependent Children; and whereas this Act is indispensable in carrying out the purposes of the Federal Child Support Program (Title IV-D) of the Social Security Act of 1935. Therefore, an emergency is hereby declared to exist and this Act being necessary for immediate preservation of the public peace, health and safety shall be in full force and effect from and after its date of passage and approval."

Acts 1979, No. 662, § 2: Mar. 29, 1979. Emergency clause provided: "It is hereby found and determined by the Seventy-Second General Assembly that the immediate passage and approval of this Act is necessary in order to allow city attorneys to prosecute violations of state misdemeanor laws in the name of the State; therefore, an emergency is hereby declared to exist and this Act being necessary for the immediate preservation of the public peace, health and safety shall be in full force and effect from and after its passage and approval."

Acts 1981 (Ex. Sess.), No. 5, § 4: Nov. 24, 1981. Emergency clause provided: "It is hereby found and determined by the General Assembly that the Tenth Judicial Circuit was accidentally designated a Class B Judicial Circuit and that this Act is immediately necessary to redesignate the Tenth Judicial Circuit as a Division A Circuit. Therefore, an emergency is hereby declared to exist and this Act being necessary for the preservation of the public peace, health and safety shall be in full force and effect from and after its passage and approval."

Acts 1985, No. 450, § 4: Mar. 20, 1985. Emergency clause provided: "It is hereby found and determined by the General Assembly that glaring errors were made in Act 526 of 1983, which was an Act providing needed assistance to victims and witnesses of crimes; that this Act is immediately necessary to correct these obvious errors. Therefore, an emergency is hereby declared to exist and this Act, being necessary for the preservation of the public peace, health and safety, shall be in full force and effect from and after its passage and approval."

Acts 1987, No. 76, § 3: Feb. 19, 1987. Emergency clause provided: "It is hereby found and determined by the General Assembly that the salaries of the prosecuting attorneys of the Third, Seventh, Eighth, Sixteenth and Twentieth Judicial Circuits are insufficient to adequately compensate the persons filling those offices; that designating those circuits as Division A circuits instead of Division B circuits will entitle the prosecuting attorneys for those circuits to increase compensation; and that such increased compensation cannot occur until this act becomes effective. Therefore, an emergency is hereby declared to exist and this act being

immediately necessary for the preservation of the public peace, health and safety shall be in full force and effect from and after its passage and approval."

Acts 1987, No. 221, § 7: July 1, 1987. Emergency clause provided: "It is hereby found and determined by the Seventy-Sixth General Assembly, that the Constitution of the State of Arkansas prohibits the appropriation of funds for more than a two (2) year period; that the effectiveness of this Act on July 1, 1987 is essential to the operation of the agency for which the appropriations in this Act are provided, and that in the event of an extension of the Regular Session, the delay in the effective date of this Act beyond July 1, 1987 could work irreparable harm upon the proper administration and provision of essential governmental programs. Therefore, an emergency is hereby declared to exist and this Act being necessary for the immediate preservation of the public peace, health and safety shall be in full force and effect from and after July 1, 1987."

Acts 1989 (1st Ex. Sess.), No. 21, § 7: July 1, 1989. Emergency clause provided: "It is hereby found and determined by the Seventy-Seventh General Assembly, that the Constitution of the State of Arkansas prohibits the appropriation of funds for more than a two (2) year period; that the effectiveness of this Act on July 1, 1989 is essential to the operation of the agency for which the appropriations in this Act are provided, and that in the event of an extension of the Regular Session, the delay in the effective date of this act beyond July 1, 1989 could work irreparable harm upon the proper administration and provision of essential governmental programs. Therefore, an emergency is hereby declared to exist and this Act being necessary for the immediate preservation of the public peace, health and safety shall be in full force and effect from and after July 1, 1989."

Acts 1991, No. 79, § 10: July 1, 1991. Emergency clause provided: "It is hereby found and determined by the Seventy-Eighth General Assembly, that the Constitution of the State of Arkansas prohibits the appropriation of funds for more than a two (2) year period; that the effectiveness of this Act on July 1, 1991 is essential to the operation of the agency for which the appropriations in this Act are provided,

and that in the event of an extension of the Regular Session, the delay in the effective date of this Act beyond July 1, 1991 could work irreparable harm upon the proper administration and provision of essential governmental programs. Therefore, an emergency is hereby declared to exist and this Act being necessary for the immediate preservation of the public peace, health and safety shall be in full force and effect from and after July 1, 1991."

Acts 1991, No. 1124, § 5: Apr. 9, 1991. Emergency clause provided: "It is hereby found and determined by the General Assembly that the present law pertaining to the funding of the Victim/Witness Programs is unclear; this Act clarifies the law by providing that the additional court cost levied under Arkansas Code § 16-21-106 must be used only to defray the cost of the Victim/Witness Program; and that this Act should go into effect immediately in order to clarify the law as soon as possible. Therefore, an emergency is hereby declared to exist and this Act being immediately necessary for the preservation of the public peace, health and safety shall be in full force and effect from and after its passage and approval."

Acts 1992 (1st Ex. Sess.), No. 33, § 7: Mar. 10, 1992. Emergency clause provided: "It is hereby found and determined by the General Assembly that the maximum annual salary for the Marianna municipal court judge is inadequate and should be increased as soon as possible and that this act will accomplish the same. Therefore, an emergency is hereby declared to exist and this act being necessary for the preservation of the public peace, health and safety shall be in full force and effect from and after its passage and approval."

Acts 1993, No. 995, § 5: Apr. 12, 1993. Emergency clause provided: "It is hereby found and determined by the General Assembly that the caseload of the First Judicial District has decreased substantially and that is no longer necessary for the Prosecuting Attorney to continue as a full time prosecutor. This act should go into effect as soon as possible to allow the current prosecuting attorney to establish a private law practice. Therefore an emergency is hereby declared to exist and this act, being necessary for the immediate preservation of the public peace, health

and safety, shall be in full force and effect upon passage and approval."

Acts 1994 (2nd Ex. Sess.), Nos. 17 and 18, § 2: Jan. 1, 1995.

Acts 1995, No. 118, § 2: effective retroactively to Jan. 1, 1995. Section 6, the emergency clause provided: "It is hereby found and determined by the General Assembly that the Prosecuting Attorney of the Fifth Judicial District in this state is inadequately compensated; that the caseload of the circuit has increased substantially; and that this act is indispensable to assure the efficient administration of justice in this circuit. Therefore an emergency is hereby declared to exist and this act, being necessary for the immediate preservation of the public peace, health and safety, shall be in full force and effective upon passage and approval." The date of approval was February 1, 1995.

Acts 1995 (1st Ex. Sess.), No. 13, § 13: Oct. 23, 1995. Emergency clause provided: "It is hereby found and determined by the General Assembly of the State of Arkansas that the current system of funding the state judicial system has created inequity in the level of judicial services available to the citizens of the state; and it is further determined that the current method of financing the state judicial system has become so complex as to make the administration of the system impossible, and the lack of reliable data on the current costs of the state judicial system prohibits any comprehensive change in the funding of the system at this time. Therefore, an emergency is hereby declared to exist and this act being necessary for the immediate preservation of the public peace, health, and safety, shall be in full force and effect from and after its passage and approval."

Acts 1997, No. 865, § 5: March 27, 1997. Emergency clause provided: "It is found and determined by the General Assembly of the State of Arkansas that the Prosecuting Attorney of the Twenty-first Judicial District is inadequately compensated; that the caseload of the District has increased substantially; and that this act is indispensable to assure the efficient administration of justice in the District. Therefore an emergency is declared to exist and this act being immediately necessary for the preservation of the public peace, health and safety shall become effective on the date of its approval by the Governor. If the bill is neither approved

nor vetoed by the Governor, it shall become effective on the expiration of the period of time during which the Governor may veto the bill. If the bill is vetoed by the Governor and the veto is overridden, it shall become effective on the date the last house overrides the veto."

Acts 1997, No. 1262, § 18: January 1, 1998.

Acts 1999, No. 35, § 5: Feb. 9, 1999. Emergency clause provided: "It is hereby found and determined by the Eighty-second General Assembly that designating the Eighth Judicial District North a Division A Judicial District results in the prosecuting attorney of that district being denied the privilege of engaging in a private law practice; that the Eighth Judicial District North would be best served by being designated a Division B Judicial District and thereby allow the prosecuting attorney to maintain a private law practice; that this act accomplishes that purpose; and that until this act becomes effective, the prosecuting attorney of the Eighth Judicial District North will be subjected to an unnecessary and burdensome restriction. Therefore, an emergency is declared to exist and this act being immediately necessary for the preservation of the public peace, health and safety shall become effective on the date of its approval by the Governor. If the bill is neither approved nor vetoed by the Governor, it shall become effective on the expiration of the period of time during which the Governor may veto the bill. If the bill is vetoed by the Governor and the veto is overridden, it shall become effective on the date the last house overrides the veto."

Acts 1999, No. 456, § 12: Mar. 8, 1999. Emergency clause provided: "It is hereby found and determined by the Eighty-second General Assembly that this act is essential to the operation of the criminal justice system within the Seventeenth and the Twenty-Third Judicial Districts, and is necessary to avoid confusion between the two districts. Therefore, an emergency is declared to exist and this act being immediately necessary for the preservation of the public peace, health and safety shall become effective on the date of its approval by the Governor. If the bill is neither approved nor vetoed by the Governor, it shall become effective on the expiration of the period of time during which the Governor may veto the bill. If

the bill is vetoed by the Governor and the veto is overridden, it shall become effective on the date the last house overrides the veto."

Acts 1999, No. 1044, § 21: July 1, 1999. Emergency clause provided: "It is hereby found and determined by the Eighty-second General Assembly, that the Constitution of the State of Arkansas prohibits the appropriation of funds for more than a two (2) year period; that the effectiveness of this Act on July 1, 1999 is essential to the operation of the agency for which the appropriations in this Act are provided, and that in the event of an extension of the Regular Session, the delay in the effective date of this Act beyond July 1, 1999 could work irreparable harm upon the proper administration and provision of essential governmental programs. Therefore, an emergency is hereby declared to exist and this Act being necessary for the immediate preservation of the public peace, health and safety shall be in full force and effect from and after July 1, 1999."

Acts 1999, No. 1508, § 19: Apr. 15, 1999. Emergency clause provided: "It is hereby found and determined by the Eighty-second General Assembly that this act makes various technical corrections in the Arkansas Code; that this act further clarifies the law to provide that the Arkansas Code Revision Commission may correct errors resulting from enactments of prior sessions; and that this act should go into effect immediately in order to be applicable during the codification process of the enactments of this regular session. Therefore, an emergency is declared to exist and this act being immediately necessary for the preservation of the public peace, health and safety shall become effective on the date of its approval by the Governor. If the bill is neither approved nor vetoed by the Governor, it shall become effective on the expiration of the period of time during which the Governor may veto the bill. If the bill is vetoed by the Governor and the veto is overridden, it shall become effective on the date the last house overrides the veto."

RESEARCH REFERENCES

ALR. Misconduct related to performance of official duties as prosecuting attorney. 10 ALR 4th 605.

Writ of prohibition against acts of public prosecutor. 16 ALR 4th 112.

Limitations on state prosecuting attorney's discretion to initiate prosecution by indictment or information. 44 ALR 4th 401.

16-21-101. Residence.

Each prosecuting attorney shall reside in the judicial district for which he may be elected, under the provisions of the Constitution of this state.

History. Acts 1981, No. 888, § 1; A.S.A. 1947, § 24-135.

16-21-102. Opinion on criminal law matters to be given to public officers.

The prosecuting attorney, without fee or reward, shall give his opinion to any county or township office in his judicial district, on matters of criminal law in which the state or county is concerned, pending before the official.

History. Acts 1981, No. 888, § 2; A.S.A. 1947, § 24-136.

CASE NOTES

Cited: Williams v. Hartje, 827 F.2d 1203 (8th Cir. 1987).

16-21-103. Duty to commence and prosecute criminal actions.

Each prosecuting attorney shall commence and prosecute all criminal actions in which the state or any county in his district may be concerned.

History. Acts 1981, No. 888, § 1; A.S.A. 1947, § 24-135.

CASE NOTES

Cited: Bates v. Bates, 303 Ark. 89, 793 S.W.2d 788 (1990).

16-21-104. Summoning witnesses before grand jury.

It shall be the duty of each prosecuting attorney, whenever he has information of the commission of any offense against the criminal and penal laws of this state or has reason to believe that any offense has been committed, to cause to be summoned all persons that he may think necessary to testify before the grand jury in relation to the offense.

History. Rev. Stat., ch. 16, § 11; C. & M. Dig., § 8318; Pope's Dig., § 10895; A.S.A. 1947, § 24-102.

CASE NOTES

Cited: Williams v. Hartje, 827 F.2d 1203 (8th Cir. 1987).

16-21-105. Justice of the peace to notify prosecutor of pendency of certain criminal proceedings — Duty of prosecutor.

(a) In any criminal action pending before any justice of the peace court, where the defendant is charged with any offense of carrying weapons unlawfully, unlawful sale of or being interested in the sale of intoxicating liquors, or gambling, by affidavit or otherwise, and pleads not guilty and secures the services of an attorney to represent him at the trial, it shall be the duty of the justice to cause the prosecuting attorney or deputy for the county to be notified of the nature of the charge and of the time and place of the trial.

(b)(1) The prosecuting attorney shall attend and prosecute in behalf of the state.

(2) In case of a conviction, the prosecuting attorney shall be allowed the same fee as is allowed for similar cases in the circuit court. However, no prosecuting attorney or his deputy shall receive any fee

unless he personally appears and prosecutes in the case, nor shall any court tax any fee where such officer does not appear and personally prosecute.

History. Acts 1895, No. 80, § 4, p. 106; C. & M. Dig., § 8310; A.S.A. 1947, § 24-123.

CASE NOTES

ANALYSIS

Fees.

—Guilty plea.

Fees.

Where a conviction obtained in a case prosecuted by a deputy was confirmed on appeal, the deputy was entitled to a fee for conviction in the justice court and the prosecuting attorney was entitled to a fee for conviction before the circuit court. *Goad v. State*, 73 Ark. 458, 84 S.W. 638 (1904).

A prosecuting attorney or his deputy cannot collect from a county contractor fees in a case where he was not personally present and prosecuting. *Peay v. Pulaski County*, 103 Ark. 601, 148 S.W. 491 (1912).

No fee is allowed the prosecuting attorney in prosecutions for vagrancy. *Peay v. Pulaski County*, 103 Ark. 601, 148 S.W. 491 (1912).

—Guilty Plea.

A deputy prosecuting attorney is not entitled to fees except when present and prosecuting and, therefore, is not entitled to a fee where the defendant appeared before a justice of the peace and pleaded guilty before the day set for trial. *Allen v. Davis*, 138 Ark. 154, 211 S.W. 151 (1919).

A deputy prosecuting attorney is entitled to a fee on conviction where he filed an information which caused the arrest of the accused and attended the court on the day of the trial, though the accused pleaded guilty. *Brown v. Welch*, 151 Ark. 142, 235 S.W. 997 (1920).

A prosecuting attorney is not entitled to a fee where the accused pleads guilty. *State v. Staples*, 158 Ark. 502, 250 S.W. 517 (1923); *Duncan v. West*, 167 Ark. 14, 267 S.W. 567 (1924).

16-21-106. Assistance to victims and witnesses of crimes — Victim of crimes case coordinator.

(a)(1) The prosecuting attorneys shall, upon request, provide to a victim and the immediate family members of all homicide victims, whether or not they are witnesses in criminal proceedings, notice of critical events in the criminal justice process, which shall include, but not be limited to:

(A) Notice of motions or hearings to establish or reduce bail or authorize other pretrial release from custody;

(B) Notice of proceedings in which any plea agreement may be submitted;

(C) Notice of trial;

(D) Notice of any motion that may substantially delay the prosecution;

(E) Notice that a court proceeding for which the victim had been subpoenaed will not transpire as scheduled;

(F) Notice of the date, time, and place of the defendant's appearance before a judicial officer;

(G) The function of a presentence report, the name, street address, and telephone number of the agency preparing the report, and the defendant's right of access to the report;

(H) Notice of the victim's right under this act to present a victim impact statement and the defendant's right to be present at the sentencing proceeding;

(I) Notice of the date, time, and place of any sentencing proceeding;

(J) Notice of the date, time, and place of any hearing for reconsideration of a sentence imposed;

(K) Notice of any sentence imposed and any modification of that sentence; and

(L) Notice of the right to receive information from the Department of Correction, State Hospital and any other facility to which the defendant is committed by the court.

(2) After a prosecution is commenced, the prosecuting attorney shall promptly inform a victim of:

(A) Relevant criminal justice procedures;

(B) The crime with which the defendant has been charged, including an explanation of the elements of crime, if necessary to an understanding of the nature of the crime; and

(C) The file number of the case and the prosecuting attorney's name, office address, and telephone number.

(3)(A) The notice may be accomplished by providing the victim or immediate family member with a telephone number to a computer notification program.

(B) Prosecutors remain responsible for providing the notice in instances where no computer notification program exists.

(4) When an immediate family member has been charged with the homicide, that person shall not be notified in accordance with this section.

(b)(1) Prosecuting attorneys shall confer with the victim before amending or dismissing a charge or agreeing to a negotiated plea or pretrial diversion.

(2) Failure of the prosecuting attorney to confer with the victim does not affect the validity of an agreement between the prosecuting attorney and the defendant or of an amendment, dismissal, plea, pretrial diversion, or other disposition.

(c)(1) The prosecuting attorney of the county from which the inmate was committed shall notify the Post Prison Transfer Board at the time of commitment of the desire of the victim, or member of the victim's family, to be notified of any future parole hearings and to forward to the board the last known address and telephone number of the victim or member of the victim's family.

(2) It shall be the responsibility of the victim or his next of kin to notify the board after the date of commitment of any change in regard to the desire to be notified of any future parole hearings.

(d) The prosecuting attorneys and deputy prosecuting attorneys shall provide the following services to victims of crimes and witnesses

of crimes and the family members of all homicide victims, whether or not they are witnesses in criminal proceedings:

(1) Assist such persons in obtaining protection from harm and threats of harm arising out of their cooperation with law enforcement and prosecution efforts;

(2) Assist such persons in applying for financial assistance and other social services available as a result of being a witness or victim of a crime;

(3) Assist such persons in applying for any witness fees to which they are entitled;

(4) Provide, when possible, a secure waiting area during court proceedings that does not require such persons to be in close proximity to the defendants and families and friends of the defendants and otherwise make a reasonable effort to minimize unwanted contact between the victim, members of the victim's family, or prosecution witnesses and the defendant, members of the defendant's family, or defense witnesses before, during, and immediately after a judicial proceeding; and

(5) Intercede with such persons' employers to assure that the employers cooperate with the criminal justice process in order to minimize loss of pay and other benefits resulting from court appearances.

(e) In order to enable the prosecuting attorney to perform the additional duties provided in this section:

(1) The prosecutor may request the county judge of the county to designate or provide an appropriate room or area in the county courthouse, reasonably close to the courtroom, to serve as a waiting area during court proceedings to accommodate the families and friends of the defendants, as provided in subsection (d) of this section; and

(2) The prosecutor may request the quorum court of the county to provide additional employees for his office to be known as "victim of crimes case coordinators" at such salary as may be determined by the quorum court, to be in addition to any other position available to the prosecutor's office.

History. Acts 1983, No. 526, §§ 1, 2; 1985, No. 450, §§ 1, 2; A.S.A. 1947, §§ 24-141, 24-142; Acts 1991, No. 904, §§ 14, 20; 1991, No. 1124, § 1; 1995, No. 1256, § 20; 1995 (1st Ex. Sess.), No. 13, § 4; 1997, No. 736, § 1; 1997, No. 1262, § 16; 1999, No. 1508, § 7.

A.C.R.C. Notes. Acts 1997, No. 1262, § 2, codified as § 16-90-1102, provided: "Failure to comply with this act does not create a claim for damages against a government employee, official, or entity."

Acts 1997, No. 1262, § 15, codified as § 16-90-1115, provided: "None of the provisions of this act shall be deemed to relieve any person of the duty of providing

information or notices required by any other law."

The amendment of this section by Acts 1997, No. 1262 conflicts with the amendment by Acts 1997, No. 736, and the resolution of the conflict is not governed by the later effective date of Acts 1997, No. 1262. As to the resolution of multiple legislation affecting a section, see §§ 1-2-207 and 1-2-303.

Publisher's Notes. Acts 1991, No. 904, § 22, provided: "It is hereby found that the passage of many court cost bills over several legislative sessions has caused confusion in the collection of such costs and that reasonable people can interpret

the varying language of such court costs statutes differently. This legislation is necessary to standardize the language of such court cost statutes to provide that such costs are collected in a uniform manner statewide."

Acts 1991, No. 904, § 23, provided: "This act is hereby declared to be remedial in nature and is to be liberally construed to effect its purpose."

Acts 1991, No. 904, § 24, provided: "Nothing herein shall prohibit courts from assessing reasonable probation fees."

Amendments. The 1995 amendment by No. 1256, as amended by Acts 1995 (1st Ex. Sess.), No. 13, § 4, repealed (b)(2)(B) and (C), redesignating (b)(2)(A) as (b)(2).

The 1997 amendment by No. 736 inserted present (a) and redesignated the

remaining subsections accordingly; and substituted "friends of the victims" for "friends of the defendants" in present (c)(1).

The 1997 amendment by No. 1262 rewrote this section.

The 1999 amendment repealed the version of this section as amended by Acts 1997, No. 736.

Meaning of "this act". Acts 1997, No. 1262, codified as §§ 16-21-106, 16-90-1101 — 16-90-1115, § 16-93-702(b), 16-97-102.

Cross References. Registration of sex and child offenders and community notification, § 12-12-901 et seq.

Victim notification system, § 12-12-1201 et seq.

RESEARCH REFERENCES

Ark. L. Rev. Killenbeck, And Then They Did ...? Abusing Equity in the Name of Justice, 44 Ark. L. Rev. 235.

16-21-107. Victim/Witness Coordinator.

(a) This section shall be known as the "Victim/Witness Coordinator Act".

(b) There is created a Victim/Witness Coordinator to provide technical assistance and support to all victims of crimes and their families and to witnesses to crimes who are involved in the criminal justice system, to establish programs intended to result in such support, and to provide a communication network for victim/witness programs.

(c) The Victim/Witness Coordinator shall be located in the Office of the Prosecutor Coordinator.

History. Acts 1985, No. 408, §§ 1-3; A.S.A. 1947, §§ 24-143 — 24-145.

16-21-108. Child support enforcement — Participation in federal programs — Collection and assessment of costs.

(a) The prosecuting attorneys of the several judicial districts in the State of Arkansas shall be designated as local units of government for the express purpose of permitting contracting with the Department of Finance and Administration for the provision of legal services under Part D of Title IV of the Social Security Act of 1935, as delegated to the states in 1975.

(b) All collections resulting from such a program shall be placed in a special account for each county, namely a child support enforcement account, and distributed in keeping with the requirements of Public

Law 93-647 and rules and regulations promulgated by the Department of Finance and Administration.

(c)(1) In all cases wherein any trial court, which shall, for the purposes of this section, mean circuit or chancery courts, shall levy a fine or forfeiture as a result of an appearance by the prosecutor or his deputy, the fine or forfeiture shall be deposited directly with the county treasurer, who shall enter the exact amount in a separate account and deposit the funds into the prosecuting attorney's fund.

(2) The county treasurer of those counties comprising the Sixth Judicial District shall account for the prosecuting attorney's fund on a separate ledger sheet and shall provide a monthly statement to the prosecuting attorney of the district, itemizing the total by amount of fines, fees, forfeitures, and costs assessed for the month.

(d)(1) In each case in which the prosecuting attorney shall make an appearance and the defendant is judged guilty, the court shall assess the defendant costs, which shall be paid directly to the prosecuting attorney's fund.

(2) The prosecuting attorney shall enforce the provisions of this section by action to compel assessment of costs, where necessary.

(e)(1) The prosecuting attorney of the Sixth Judicial District shall submit a proposed budget to the quorum courts of the counties comprising the Sixth Judicial District for their advice and counsel.

(2) The quorum court shall then make advisory recommendations to both houses of the General Assembly concerning the prosecuting attorney's proposed budget.

History. Acts 1977, No. 565, §§ 1-5; A.S.A. 1947, §§ 24-130 — 24-134.

A.C.R.C. Notes. The Child Support Enforcement Unit was transferred from the Department of Human Services to the Department of Finance and Administration as the Office of Child Support Enforcement.

U.S. Code. Part D of Title IV of the

Social Security Act of 1935, referred to in this section, is codified as 42 U.S.C. § 651 et seq.

Public Law 93-647, referred to in this section, is codified primarily as 42 U.S.C. §§ 303, 602-604, 606, 622, 651-660, 1203, 1306, 1308, 1315, 1316, 1320b (note), 1353, 1383 (note), and 1397-1397f.

16-21-109. Fees in felony cases paid to general revenue fund of county.

The prosecuting attorney's fees provided by law shall be charged against the defendants in felony cases, and when they are collected shall be paid into the county treasury to the credit of the general revenue fund.

History. Acts 1937, No. 214, § 7; Pope's Dig., § 10908; A.S.A. 1947, § 24-116.

16-21-110. Report of, and payment over of, moneys received — Penalty for noncompliance.

(a) Each prosecuting attorney shall, on or before January 1 in each year, file in the office of the Auditor of State, and in the offices of the several county treasurers in his district, an account in writing, verified by the affidavit of such attorney, of all the moneys received by him by virtue of his office, during the preceding year, for the use of the state or any county and, at the same time, shall pay over all such moneys to the Treasurer of State or to any county treasurer entitled to receive the moneys.

(b) If any prosecuting attorney neglects to perform the duties required of him in subsection (a) of this section, he shall be deemed guilty of negligence in his office and shall be proceeded against accordingly.

History. Rev. Stat., ch. 16, §§ 13, 14; §§ 10898, 10899; A.S.A. 1947, §§ 24-105, C. & M. Dig., §§ 8321, 8322; Pope's Dig., 24-106.

16-21-111. Law library.

(a) In all judicial districts in this state in which there is a county with more than one hundred twenty thousand (120,000) inhabitants according to the most recent federal census and where there are more than two (2) divisions of the circuit court and more than one (1) municipal court with countywide jurisdiction, and in which county the office of the prosecuting attorney is maintained permanently in the county courthouse, the prosecuting attorney may expend from the contingent fund provided by the county such sums as are necessary for the purchase and maintenance of an adequate law library.

(b) The law library, when purchased, shall become the property of the county.

History. Acts 1949, No. 245, §§ 1, 2; A.S.A. 1947, §§ 24-124, 24-125.

CASE NOTES

Cited: Kendall v. Henderson, 238 Ark. 832, 384 S.W.2d 954 (1964).

16-21-112. Prosecuting attorney pro tempore.

(a) If any prosecuting attorney neglects, or fails from sickness or any other cause, to attend any of the courts of the district for which he was elected and to prosecute as required by law, it shall be the duty of the court to appoint some proper person, being an attorney at law, to prosecute for the state during the term. That person shall, on taking the oath of office, perform all the duties of the regular prosecuting attorney for the term.

(b)(1) The person so appointed shall be entitled to receive the same fees on convictions as the prosecuting attorney, and the sum of forty

dollars (\$40.00) for each term of the court, for prosecuting as provided in subsection (a) of this section, to be paid by the Treasurer of State out of any money appropriated for that purpose.

(2) It shall be the duty of the Auditor of State, on receiving the certificate of the judge of the circuit court making the appointment of the prosecuting attorney pro tempore, to audit and allow the account and draw his warrant on the Treasurer of State for the payment thereof.

(3) The amounts allowed in this subsection for prosecuting attorneys pro tempore shall be deducted from the regular prosecuting attorney's salary whenever a failure occurs on his part which is not occasioned by sickness of himself or family.

(c) Judges of municipal courts shall have the same authority as judges of circuit courts to appoint a special prosecutor under the circumstances as prescribed in this section.

History. Acts 1875 (Adj. Sess.), No. 5, §§ 24-117, 24-118; Acts 1889, No. 825, §§ 1, 2, p. 6; C. & M. Dig., §§ 8323, 8324; § 1. Pope's Dig., §§ 10900, 10901; A.S.A. 1947,

CASE NOTES

ANALYSIS

Appointment.
Compensation.

Appointment.

The literal reading of this section expresses an intent that a special prosecutor shall be appointed when the prosecuting attorney both fails to attend court and to prosecute as required by law, and this section and § 16-21-116 fall short of providing authority for circuit court to appoint a special prosecuting attorney to assist the grand jury when the elected prosecuting attorney is allegedly involved in the commission of a crime. *Weems v. Anderson*, 257 Ark. 376, 516 S.W.2d 895 (1974).

Since this section expressly provides how a special prosecutor is appointed, it excludes an appointment by an inferior court. *Venhaus v. Hale*, 281 Ark. 390, 663 S.W.2d 930 (1984).

Compensation.

The inherent power of the courts to order the expenditure of funds to compensate court-appointed prosecutors is limited by statute in Arkansas. An attorney appointed by a municipal court as a special prosecutor is not entitled to recover from the county for the services rendered by him in the absence of statutory authority for the appointment or the compensation. *Venhaus v. Hale*, 281 Ark. 390, 663 S.W.2d 930 (1984).

16-21-113. Deputies.

(a)(1) The prosecuting attorneys of the several judicial districts of this state may appoint one (1) deputy in each of the several counties composing their districts. In counties having two (2) judicial districts, a deputy may be appointed for each district.

(2) The appointment shall not take effect until approved, in writing, by the judge of the circuit court of the district. The approval shall be filed in the office of the clerk of the circuit court of the county for which such deputy is appointed.

(b) In judicial districts which contain a county which has two (2) levying courts or in those judicial districts where the prosecuting attorney and the circuit judge concur in the necessity therefor, the prosecuting attorney of the judicial districts may appoint one (1) or more deputies whose jurisdiction shall be the same as that of the prosecuting attorney.

(c)(1) The deputy prosecuting attorney provided for in this section shall have authority to file an information with any justice of the peace, municipal court judge, or the circuit court of his judicial district, in the name of the prosecutor charging any person with the commission of any offense against the laws of this state.

(2) Upon the filing of the information, it shall be the duty of such justice of the peace or municipal court judge, or the clerk of the circuit court, to issue a warrant for the arrest of the offender. In such a case, no bond for cost of prosecution shall be required.

(d) When any person shall have been arrested under a warrant issued in accordance with the provisions of this section, it shall be the duty of the deputy prosecuting attorney to attend and prosecute such charges on behalf of the state. He shall in a similar manner attend and prosecute on behalf of the state in any criminal case pending before any justice of the peace or municipal court judge or in the circuit court of his judicial district, when so requested by the justice of the peace, municipal court judge, or the prosecuting attorney of the judicial district.

(e) In the event of a conviction, he shall be allowed the same fees as provided by law for the prosecuting of misdemeanor cases. However, the deputy prosecuting attorney shall not be entitled to fees for the prosecution of felony cases.

(f) The deputy prosecuting attorney shall receive no fees or salary from the state for his services and may be removed at any time by the prosecuting attorney appointing him.

(g) The special deputy prosecuting attorney for the Eleventh Judicial District shall be available to provide services to any other judicial district in the state in which state penal facilities are located or in which state penal matters are involved, when called upon by the prosecutor of any such judicial district.

History. Acts 1893, No. 59, § 3, p. 88; C. & M. Dig., § 8311; Acts 1937, No. 286, §§ 1, 3, 4; Pope's Dig., §§ 10884-10886, 10888; Acts 1947, No. 52, § 1; 1947, No. 151, § 1; 1977, No. 439, § 3; A.S.A. 1947, §§ 24-119 — 24-122; Acts 1987, No. 221, § 3; 1989 (1st Ex. Sess.), No. 21, § 3; 1991, No. 79, § 3; 1995, No. 1256, § 20; 1995 (1st Ex. Sess.), No. 13, § 4.

A.C.R.C. Notes. Former versions of subsection (h) are deemed to be superseded by the current subsection enacted in 1991.

Acts 1989, No. 585, § 1, provided: "In addition to the deputy prosecutor posi-

tions created by § 16-21-113 and other Arkansas Code provisions, the prosecuting attorneys of the Eighth, Ninth-West, Tenth, Thirteenth, Sixteenth and Twentieth Judicial Districts shall have the power to appoint deputy prosecuting attorneys, investigators, or employees at such salaries as are authorized in the grant awards from the Department of Finance and Administration, Intergovernmental Services, Drug Law Enforcement Program, Anti-Drug Abuse Act of 1986. Said investigators and case coordinators shall have jurisdiction throughout the judicial district served, and have the power granted

to peace officers by the statutes of this State and may serve process issuing out of all courts within the judicial district."

Amendments. The 1995 amendment by No. 1256, as amended by Acts 1995 (1st Ex. Sess.), No. 13, § 4, repealed former

(f), redesignating former (g) and (h) as present (f), and (g).

Cross References. Authority to appoint deputy prosecuting attorneys and employees, § 16-21-145.

CASE NOTES

ANALYSIS

Approval by judge.

General assembly member.

Reappointment.

Removal.

Approval by Judge.

The approval by the judge as provided for in this section involves judicial discretion and is not a ministerial act and, consequently, cannot be controlled by mandamus; however, there must be good reason for failure to approve, and, the authority being judicial, the judge's action under this section is reviewable on certiorari. *State ex rel. Pilkinton v. Bush*, 211 Ark. 28, 198 S.W.2d 1004 (1947).

General Assembly Member.

Since the deputy prosecuting attorney's office is a state office and he is a state officer, a member of General Assembly is prohibited from being appointed or serving as a deputy prosecuting attorney. *Martindale v. Honey*, 259 Ark. 416, 533 S.W.2d 198 (1976), *aff'd*, 261 Ark. 708, 551 S.W.2d 202 (1977).

Reappointment.

Where deputy prosecuting attorney was not formally reappointed when prosecut-

ing attorney began new term but continued to function as deputy with acquiescence of circuit judge, deputy was de facto official and his authority could not be collaterally attacked by motion to dismiss the informations he had filed as deputy. *State v. Roberts*, 255 Ark. 183, 499 S.W.2d 600 (1973).

Removal.

This section is read into the appointment the same as if fully written therein and prosecuting attorney could not make an appointment and abrogate his statutory right to remove the deputy. *Sheffield v. Heslep*, 206 Ark. 605, 177 S.W.2d 412 (1944).

Though appointment of deputy prosecuting attorney was for a fixed time, he was subject to removal at any time. *Sheffield v. Heslep*, 206 Ark. 605, 177 S.W.2d 412 (1944).

Ineligibility of successor deputy prosecuting attorney would not allow former appointee to hold over after his removal. *Sheffield v. Heslep*, 206 Ark. 605, 177 S.W.2d 412 (1944).

Cited: *Ford v. State*, 4 Ark. App. 135, 628 S.W.2d 340 (1982); *Summers v. State*, 300 Ark. 525, 780 S.W.2d 540 (1989).

16-21-114. County attorneys.

(a) A county civil attorney or county attorney may be selected pursuant to ordinance of the quorum court for each county in the state.

(b) The county attorney shall commence and prosecute or defend all civil actions in which his county is concerned.

(c) The county attorney shall give his opinion, without fee or reward, to any township or county official on any question of civil law concerning the county which is pending before the official.

(d) All civil duties provided by the laws of the State of Arkansas or the ordinances of the several counties to be performed by the prosecuting attorney shall be performed by the county attorney in those counties which have established the office of civil attorney.

(e) The office of county attorney shall be funded pursuant to ordinance of the quorum court of the county.

(f)(1) In counties having a full-time office of county civil attorney or a contract county civil attorney, every municipality, school district, and other local taxing unit receiving ad valorem or other tax funds collected by county collectors shall reimburse the county for the taxing unit's pro rata share of the necessary legal costs incurred by the county in assessing property, collecting taxes, and receiving and disbursing revenues for the unit.

(2) Such legal costs shall include:

(A) Reasonable expenses incurred by a county civil attorney and his staff while providing tax-related legal services for the unit; and

(B) A percentage of the salaries and fringe benefits of a full-time county civil attorney and his staff based on the ratio between time spent on tax-related legal services for the taxing unit and time spent on all legal services; and

(C) A reasonable fee charged by a contract county civil attorney for services rendered regarding the assessment, collection, receipt, or disbursement of taxes.

(3) The amount to be reimbursed annually by each taxing unit, as its pro rata share of the county's necessary legal costs, shall be based on the proportion that the total of taxes collected for the benefit of each taxing unit bears to the total of taxes collected for the benefit of all taxing units.

(4) To facilitate reimbursement, there is hereby created a county attorney's fund, which shall be administered in the same manner as the county assessor's fund established in § 14-15-204.

History. Acts 1981, No. 888, §§ 3-6; A.S.A. 1947, §§ 24-137 — 24-140; Acts 1989, No. 633, § 1.

CASE NOTES

Cited: Williams v. Hartje, 827 F.2d 1203 (8th Cir. 1987); Hollowell v. Gravett, 703 F. Supp. 761 (E.D. Ark. 1988).

16-21-115. City attorneys.

A prosecuting attorney may designate the duly elected or appointed city attorney of any municipality within the prosecutor's district to prosecute in the name of the state in municipal or other corporation courts violations of state misdemeanor laws, which violations occurred within the limits of the municipality, if the city attorney agrees to the appointment.

History. Acts 1979, No. 662, § 1; A.S.A. 1947, § 24-122.1.

CASE NOTES

In General.

City attorney of a first-class city had authority to prosecute a state misdemeanor violation because he was acting as

a de facto official. *Chronister v. State*, 55 Ark. App. 93, 931 S.W.2d 444 (1996).

Cited: *Bigham v. State*, 23 Ark. App. 108, 743 S.W.2d 405 (1988).

16-21-116. Indictment and punishment for misdemeanor in office or neglect of duty — Prosecution.

(a) Prosecuting attorneys may be indicted for any misdemeanor in office or neglect of duty and punished by fine of not less than fifty dollars (\$50.00) nor more than one thousand dollars (\$1,000).

(b)(1) When a bill of indictment has been found against any prosecuting attorney, for any offense whatever, it shall be the duty of the court in which the indictment is found to appoint some person, being an attorney at law, to conduct the prosecution against the prosecuting attorney.

(2) If the prosecuting attorney is convicted, the attorney conducting the prosecution shall be entitled to receive the sum of fifty dollars (\$50.00) out of the salary of the prosecuting attorney. The Auditor of State, on receiving a certificate of the conviction of the prosecuting attorney, shall draw his warrant on the Treasurer of State for such sum, if so much of the attorney's salary is due.

History. Rev. Stat., ch. 16, §§ 8-10; C. §§ 10892-10894; A.S.A. 1947, §§ 24-107 & M. Dig., §§ 8315-8317; Pope's Dig., — 24-109.

CASE NOTES

ANALYSIS

Constitutionality.

Prosecuting attorney as witness.

Special prosecutor.

Constitutionality.

The adoption by the State of Arkansas of the Constitution of 1874 making the prosecuting attorney a constitutional officer did not void the provisions of this section. That part of this section providing for a fee for the special prosecutor if a conviction of the prosecuting attorney is obtained, is not violative of due process, since the amount involved is so small as to be inconsequential when compared to the overall expenses of prosecuting the prosecutor, and because the fee portion of this section is severable from the remainder so that if the fee portion were held unconstitutional the remainder could be severed and any error would be harmless error. *Weems v. Anderson*, 257 Ark. 376, 516 S.W.2d 895 (1974).

Prosecuting Attorney as Witness.

The trial court did not abuse its discretion in failing to grant the defendant's motion to disqualify the prosecuting attorney and his entire staff on the ground that the prosecuting attorney was to appear as a witness in the criminal prosecution where the prosecuting attorney did not participate at all in the decision to charge, preparation of the case, pretrial matters, or the actual trial, except to testify. *Ford v. State*, 4 Ark. App. 135, 628 S.W.2d 340 (1982).

Special Prosecutor.

This section falls short of providing authority for circuit court to appoint a special prosecuting attorney to assist the grand jury when the elected prosecuting attorney is allegedly involved in the commission of a crime. However, Arkansas circuit courts have an inherent power to appoint a special prosecuting attorney where the elected prosecuting attorney is under investigation for alleged commis-

sion of a crime. *Weems v. Anderson*, 257 Ark. 376, 516 S.W.2d 895 (1974).

The inherent power of the circuit court to appoint a special prosecuting attorney to investigate a charge, to assist the grand jury and prosecute the prosecuting attorney, surely includes the right to appoint a special prosecutor to investigate, assist the grand jury, and prosecute a person charged as co-conspirator with the prosecuting attorney. *Weems v. Anderson*, 257 Ark. 376, 516 S.W.2d 895 (1974).

This section does not require that the

special prosecuting attorney be a resident of the judicial district for which he is appointed. *Weems v. Anderson*, 257 Ark. 376, 516 S.W.2d 895 (1974).

A special prosecutor does not displace the prosecuting attorney from his constitutional office, but in order for him to be effective in the investigation and prosecution of the matters for which he has been appointed, he must have the right to proceed in the same manner as the prosecuting attorney. *Weems v. Anderson*, 257 Ark. 376, 516 S.W.2d 895 (1974).

16-21-117. Salaries of prosecuting attorneys — Classification of judicial districts.

For the purposes of fixing just and equitable salaries for the several prosecuting attorneys of the State of Arkansas, the judicial districts of the State of Arkansas are divided as follows:

(1)(A) All judicial districts having a population in excess of one hundred fifteen thousand (115,000), with at least one (1) county having a population in excess of eighty-five thousand (85,000), or any judicial district with two (2) county seats, in which one of the county seats has a population in excess of sixty thousand (60,000) by the most recent federal census, or any other judicial district in which the prosecuting attorney executes and files with the Clerk of the Senate and the Clerk of the House of Representatives an affidavit stating that:

(i) The workload of the district, in his opinion, justifies the designation of the district as a Division A Judicial District; and

(ii) Adequate funds for the efficient operation of the office have been appropriated by the quorum court of the counties which comprise the district

shall be designated Division A Judicial Districts for the purposes of this section.

(B) No district shall be changed from Division B to Division A except by legislative enactment of the General Assembly.

(2) All judicial districts not designated as Division A Judicial Districts shall be Division B Judicial Districts for the purposes of this section.

History. Acts 1937, No. 214, §§ 1, 2; Pope's Dig., §§ 10902, 10903; Acts 1947, No. 422, § 1; 1949, No. 213, § 1; 1949, No. 466, § 1; 1951, No. 32, § 1; 1951, No. 61, § 1; 1953, No. 57, §§ 1, 2; 1957, No. 420, § 1; 1961, No. 176, § 1; 1963, No. 454, § 1; 1963, No. 486, § 1; 1965, No. 406, § 1; 1967, No. 307, § 1; 1971, No. 384, §§ 1, 2; 1973, No. 779, §§ 1-3; 1975, No. 898, §§ 1, 2; 1977, No. 319, §§ 1, 2; 1979, No. 447, §§ 1, 2; 1979, No. 834, § 2; 1981,

No. 193, § 1; 1981 (Ex. Sess.), No. 5, § 1; A.S.A. 1947, §§ 24-110, 24-111; Acts 1987, No. 76, § 1; 1988 (3rd Ex. Sess.), No. 12, § 1; 1989, No. 13, § 1; 1989, No. 813, § 1; 1992 (1st Ex. Sess.), No. 33, § 2; 1993, No. 1306, § 11.

Publisher's Notes. Similar provisions to former subsection (b) may now be found at §§ 16-21-121—16-21-144.

Amendments. The 1993 amendment deleted former (b)(1) and (2).

Cross References. Salaries of prosecuting attorneys, Ark. Const. Amend. 21, § 2.

CASE NOTES

Appropriation.

Prosecuting attorneys are entitled to receive the salary fixed by law even where no legislative appropriation was made therefor, since no specific appropriation by

the legislature is necessary. *Smith v. Page*, 192 Ark. 342, 91 S.W.2d 281 (1936) (decision under prior law).

Cited: *Riviere v. Hardegree*, 278 Ark. 167, 644 S.W.2d 276 (1983).

16-21-118. Division A Districts.

The prosecuting attorneys in the Division A Judicial Districts shall not engage in the private practice of law during their terms in office.

History. Acts 1937, No. 214, § 3; Pope's Dig., § 10904; Acts 1953, No. 57, § 3; 1959, No. 308, § 1; 1965, No. 557, § 1; 1967, No. 472, § 1; 1971, No. 384, § 3; 1975, No. 898, § 3; 1977, No. 319, § 3;

1979, No. 447, § 3; A.S.A. 1947, § 24-112; Acts 1999, No. 553, § 29.

Amendments. The 1999 amendment deleted (b).

16-21-119. Contingent expense funds generally.

(a) The prosecuting attorney of each judicial district shall be allowed a contingent expense of his office, including telephone, telegraph, postage, printing, office supplies and equipment, office rent, stationery, traveling expense, special service, operation of automobiles, and such other expenses which, within the discretion of the prosecuting attorney, may be a proper expense of the office. It shall also include necessary expenses in connection with any proper investigation incident to any criminal law violation or trials before any grand jury, or any court within the judicial district, coming within the duties of his office.

(b) The expense provided for in subsection (a) of this section shall be paid by the several counties of this state by vouchers signed by the prosecuting attorney and allowed by the county court as claims against the general revenue fund of said county, and for the purpose of providing a just and equitable manner and method of payment, the several counties of the State of Arkansas are classified as follows:

(1) All counties having a population of less than fifteen thousand (15,000) persons according to the most recent federal census and with an assessed valuation of less than two million dollars (\$2,000,000) shall pay annually not in excess of two hundred dollars (\$200). However, Cleveland County, Dallas County, Nevada County, Lafayette County, and Montgomery County shall pay annually not in excess of four hundred dollars (\$400);

(2) All counties having a population in excess of fifteen thousand (15,000) persons and not in excess of twenty-five thousand (25,000) persons according to the most recent federal census and with an assessed valuation of less than five million dollars (\$5,000,000) shall pay annually not in excess of four hundred dollars (\$400). However, Drew County, Bradley County, and Clark County shall pay annually not

in excess of six hundred dollars (\$600) and Woodruff County shall pay annually not in excess of eight hundred dollars (\$800);

(3) All counties now or hereafter having a population in excess of twenty-five thousand (25,000) persons and not in excess of twenty-nine thousand (29,000) persons according to the most recent federal census and with an assessed valuation of less than seven million five hundred thousand dollars (\$7,500,000) shall pay annually not in excess of five hundred dollars (\$500). However, Hempstead County, Chicot County, and Ashley County shall pay annually not in excess of eight hundred dollars (\$800);

(4) All counties having a population in excess of twenty-nine thousand (29,000) persons and not in excess of forty thousand (40,000) persons according to the most recent federal census and with an assessed valuation of less than eleven million dollars (\$11,000,000) shall pay annually not in excess of eight hundred dollars (\$800). However, St. Francis County and White County shall pay annually not in excess of one thousand two hundred dollars (\$1,200), and Saline County shall pay annually not in excess of three thousand dollars (\$3,000);

(5)(A) All counties having a population in excess of forty thousand (40,000) persons and not in excess of fifty thousand (50,000) persons according to the most recent federal census and with assessed valuation of less than fifteen million dollars (\$15,000,000) shall pay annually not in excess of one thousand dollars (\$1,000). However, Phillips County shall pay annually not in excess of one thousand four hundred dollars (\$1,400);

(B) Any county with a population of not less than fifty-two thousand (52,000) persons nor more than sixty-one thousand (61,000) persons according to the 1970 federal census shall pay annually the sum of six thousand dollars (\$6,000);

(6) All counties now or hereafter having a population in excess of fifty thousand (50,000) persons and not in excess of seventy-five thousand (75,000) persons according to the most recent federal census and with an assessed valuation of less than twenty-five million dollars (\$25,000,000) shall pay annually not in excess of one thousand two hundred dollars (\$1,200). However, Jefferson County shall pay annually not in excess of one thousand eight hundred dollars (\$1,800);

(7) All counties having a population in excess of seventy-five thousand (75,000) persons and not in excess of one hundred twenty thousand (120,000) persons according to the most recent federal census and with an assessed valuation of less than fifty million dollars (\$50,000,000) shall pay annually not in excess of two thousand five hundred dollars (\$2,500);

(8) All counties having a population in excess of two hundred forty thousand (240,000) persons according to the most recent federal census and with an assessed valuation of not less than fifty million dollars (\$50,000,000) shall pay annually not less than one hundred twenty-seven thousand dollars (\$127,000), nor more than one hundred fifty

thousand dollars (\$150,000), as established by the quorum court of the counties.

(c) Any county falling within one (1) classification according to population, but falling within a smaller classification according to the assessed valuation, shall be considered as being within, and shall pay expense according to, the larger classification.

History. Acts 1937, No. 214, §§ 4-6; Pope's Dig., §§ 10905-10907; Acts 1947, No. 152, § 1; 1949, No. 94, §§ 1-3; 1951, No. 17, § 1; 1951, No. 241, § 1; 1951, No. 387, §§ 1-3; 1951, No. 355, §§ 1-5; 1957, No. 420, §§ 2, 3; 1967, No. 16, § 1; 1969, No. 317, § 1; 1971, No. 430, § 1; 1973, No. 30, § 1; 1973, No. 322, § 1; 1977, No. 117, § 1; 1979, No. 415, § 1; 1979, No. 514, § 1; 1981, No. 126, § 1; A.S.A. 1947, §§ 24-113—24-115.

Publisher's Notes. Acts 1977, No. 117, § 3, provided, in part, that the contingency allowances authorized in the act for the operation of the prosecuting attorney's office in the Sixth Judicial District should

be provided by appropriation from the county general fund by the quorum court, and further provided that in the event the quorum court should fail to appropriate the funds, or should make an appropriation of funds less than the amount provided in the act, the circuit court might, upon petition of the prosecuting attorney of the Sixth Judicial District, enter an appropriate order compelling the payment of the full amount thereof by the appropriate county officials or in such amount as determined by the circuit court as being necessary for the efficient operation of the office.

CASE NOTES

ANALYSIS

Payment of expenses.
Services outside county.

Payment of Expenses.

Where the legislature has established payment of expenses to prosecuting attorneys by paying a monthly lump sum without itemization, a court has no power to inquire into the wisdom, amount, necessity or propriety of the legislative decision; in the absence of proof by the plaintiff taxpayers that the moneys were not used as expenses by the prosecuting attorney, the legislative authorization cannot be disregarded and the prosecuting attorney could not be required to repay monthly

lump sum payments he received for expenses. *Munson v. Abbott*, 269 Ark. 441, 602 S.W.2d 649 (1980).

Services Outside County.

Where a county prosecuting attorney was paid for expenses for work done in another county, the prosecuting attorney could not be required to reimburse the county he served for those expense payments, since it was clear that the payments were for proper expenses of the prosecuting attorney's office and nothing in this section mandates the separation of expenses by the county. *Munson v. Abbott*, 269 Ark. 441, 602 S.W.2d 649 (1980).

Cited: *Villines v. Tucker*, 324 Ark. 13, 918 S.W.2d 153 (1996).

16-21-120. Fees from persons issuing bad checks — Special fund — Expenditures — Reports.

(a) Fees collected under this act shall be deposited in a special fund to be administered by the prosecuting attorney.

(b) Expenditures from this fund shall be at the sole discretion of the prosecuting attorney and may be used only to defray the salaries and expenses of the prosecuting attorney's office, but in no event may the prosecuting attorney or any deputy prosecutor who is paid on the fee system supplement his or her own salary, nor may the prosecuting

attorney increase any employee's salary, without approval of the quorum court of the county where employed from this fund.

(c) The prosecuting attorney shall annually prepare and present to the quorum courts of each county within his or her district a report showing all receipts and disbursements from the special fund created by this section.

(d) Nothing in this act shall be construed to decrease the total salaries, expenses, and allowances which a prosecuting attorney's office is receiving as of June 26, 1985.

(e) This act is cumulative to all other acts and shall not repeal any other act.

History. Acts 1985 (1st Ex. Sess.), No. 33, §§ 3, 4; A.S.A. 1947, §§ 67-728, 67-728n.

Meaning of "this act". Acts 1985 (1st Ex. Sess.), No. 33 is codified as §§ 5-37-307, 16-21-120, 21-6-411.

Cross References. Fees for collecting

and processing certain checks, orders, or drafts, § 21-6-411.

Fee reports by agencies and public officials, § 16-21-205.

Power and authority of prosecutor and deputies, § 16-21-1703.

16-21-121. First Judicial District Prosecuting Attorney.

(a) Beginning May 1, 1993, the First Judicial District Division A Prosecuting Attorney shall be reclassified as a Division B Judicial District Prosecuting Attorney.

(b) The Prosecuting Attorney of the First Judicial District shall work at least forty (40) hours per week as prosecutor and shall disqualify himself from serving as prosecutor in any case in which there is a conflict of interest with persons or parties he represents in his private law practice.

History. Acts 1993, No. 995, § 1.

16-21-122. The Second Judicial District.

The Second Judicial District shall be a Division A Judicial District.

History. Acts 1993, No. 1306, § 1.

A.C.R.C. Notes. As originally enacted

by Acts 1993, No. 1306, § 1, this section ended "effective January 1, 1993."

16-21-123. The Third Judicial District.

The Third Judicial District shall be a Division A Judicial District.

History. Acts 1993, No. 1306, § 1.

A.C.R.C. Notes. As originally enacted by Acts 1993, No. 1306, § 1, this section ended "effective January 1, 1993."

Acts 1987, No. 76, § 1, provided that the Third and Sixteenth Judicial Districts are Division A districts retroactive to January 1, 1987, the Eighth Judicial District

is a Division A district as of March 1, 1987, the Seventh and Twentieth Judicial Districts are Division A districts as of July 1, 1987, the Eighth Judicial District will remain a Division B district until March 1, 1987, and the Seventh and Twentieth Judicial Districts will remain Division B districts until July 1, 1987.

16-21-124. The Fourth Judicial District.

The Fourth Judicial District shall be a Division A Judicial District.

History. Acts 1993, No. 1306, § 1.

A.C.R.C. Notes. As originally enacted

by Acts 1993, No. 1306, § 1, this section ended "effective January 1, 1993."

16-21-125. The Fifth Judicial District.

The Fifth Judicial District shall be a Division A Judicial District.

History. Acts 1993, No. 1306, § 1; 1995, No. 118, § 1.

A.C.R.C. Notes. As originally enacted by Acts 1993, No. 1306, § 1, this section ended "effective January 1, 1993."

Amendments. The 1995 amendment substituted "Division A" for "Division B."

16-21-126. The Sixth Judicial District.

The Sixth Judicial District shall be a Division A Judicial District.

History. Acts 1993, No. 1306, § 1.

A.C.R.C. Notes. As originally enacted

by Acts 1993, No. 1306, § 1, this section ended "effective January 1, 1993."

16-21-127. [Repealed.]

Publisher's Notes. This section, concerning the Seventh Judicial District, was repealed by Acts 1997, No. 827, § 9, effective

January 1, 1999. The section was derived from Acts 1993, No. 1306, § 1; Acts 1997, No. 827, § 7.

16-21-128. The Eighth Judicial District.

(a) The Eighth Judicial District-North shall be a Division B Judicial District.

(b) Effective January 1, 1999, the Eighth Judicial District-South shall be a Division A Judicial District.

History. Acts 1993, No. 1306, § 1; 1997, No. 1270, § 5; 1999, No. 35, § 1.

A.C.R.C. Notes. As originally enacted by Acts 1993, No. 1306, § 1, this section ended "effective January 1, 1993."

Acts 1987, No. 76, § 1, provided that the Third and Sixteenth Judicial Districts are Division A districts retroactive to January 1, 1987, the Eighth Judicial District is a Division A district as of March 1, 1987, the Seventh and Twentieth Judicial Districts are Division A districts as of July 1, 1987, the Eighth Judicial District will

remain a Division B district until March 1, 1987, and the Seventh and Twentieth Judicial Districts will remain Division B districts until July 1, 1987.

The repeal of this section by Acts 1997, No. 1270, § 8, effective January 1, 1999, has been superseded by its 1999 amendment.

Amendments. The 1999 amendment, in (a), deleted "Effective January 1, 1999" from the beginning, and substituted "Division B" for "Division A."

16-21-129. The Ninth Judicial District-East.

The Ninth Judicial District-East shall be a Division B Judicial District.

History. Acts 1993, No. 1306, § 1. by Acts 1993, No. 1306, § 1, this section
A.C.R.C. Notes. As originally enacted ended "effective January 1, 1993."

16-21-130. The Ninth Judicial District-West.

The Ninth Judicial District-West shall be a Division A Judicial District.

History. Acts 1993, No. 1306, § 1; 1994 Ex. Sess.) Nos. 17 and 18, § 1 began: (2nd Ex. Sess.), No. 17, § 1; 1994 (2nd Ex. Sess.), No. 18, § 1. "Beginning January 1, 1995."

A.C.R.C. Notes. As originally enacted by Acts 1993, No. 1306, § 1, this section ended "effective January 1, 1993."
Amendments. The 1994 (2nd Ex. Sess.) amendment by identical acts Nos. 17 and 18 substituted "Division A" for "Division B."

As enacted by identical Acts 1994 (2nd

16-21-131. The Tenth Judicial District.

The Tenth Judicial District shall be a Division A Judicial District.

History. Acts 1993, No. 1306, § 1. by Acts 1993, No. 1306, § 1, this section
A.C.R.C. Notes. As originally enacted ended "effective January 1, 1993."

16-21-132. The Eleventh Judicial District-East.

The Eleventh Judicial District-East shall be a Division B Judicial District.

History. Acts 1993, No. 1306, § 1. by Acts 1993, No. 1306, § 1, this section
A.C.R.C. Notes. As originally enacted ended "effective January 1, 1993."

16-21-133. The Eleventh Judicial District-West.

The Eleventh Judicial District-West shall be a Division A Judicial District.

History. Acts 1993, No. 1306, § 1. by Acts 1993, No. 1306, § 1, this section
A.C.R.C. Notes. As originally enacted ended "effective January 1, 1993."

16-21-134. The Twelfth Judicial District.

The Twelfth Judicial District shall be a Division A Judicial District.

History. Acts 1993, No. 1306, § 1. by Acts 1993, No. 1306, § 1, this section
A.C.R.C. Notes. As originally enacted ended "effective January 1, 1993."

16-21-135. The Thirteenth Judicial District.

The Thirteenth Judicial District shall be a Division B Judicial District.

History. Acts 1993, No. 1306, § 1.

A.C.R.C. Notes. As originally enacted

by Acts 1993, No. 1306, § 1, this section ended "effective January 1, 1993."

16-21-136. The Fourteenth Judicial District.

The Fourteenth Judicial District shall be a Division A Judicial District.

History. Acts 1993, No. 1306, § 1.

A.C.R.C. Notes. As originally enacted

by Acts 1993, No. 1306, § 1, this section ended "effective January 1, 1993."

16-21-137. The Fifteenth Judicial District.

The Fifteenth Judicial District shall be a Division A Judicial District.

History. Acts 1993, No. 1306, § 1; 1997, No. 322, § 1.

A.C.R.C. Notes. As originally enacted by Acts 1993, No. 1306, § 1, this section ended "effective January 1, 1993."

Amendments. The 1997 amendment substituted "Division A" for "Division B."

16-21-138. The Sixteenth Judicial District.

The Sixteenth Judicial District shall be a Division B Judicial District.

History. Acts 1993, No. 1306, § 1.

A.C.R.C. Notes. As originally enacted by Acts 1993, No. 1306, § 1, this section ended "effective January 1, 1993."

Acts 1987, No. 76, § 1, provided that the Third and Sixteenth Judicial Districts are Division A districts retroactive to January 1, 1987, the Eighth Judicial District is a Division A district as of March 1, 1987, the Seventh and Twentieth Judicial Districts are Division A districts as of July 1,

1987, the Eighth Judicial District will remain a Division B district until March 1, 1987, and the Seventh and Twentieth Judicial Districts will remain Division B districts until July 1, 1987.

Acts 1993, No. 360, § 1, provided that: "Retroactive to January 1, 1993, the Sixteenth Judicial District Division A Prosecuting Attorney shall be reclassified as a Division B Judicial District Prosecuting Attorney."

16-21-139. The Seventeenth Judicial District.

The Seventeenth Judicial District shall be a Division A Judicial District.

History. Acts 1993, No. 1306, § 1; 1999, No. 456, § 5.

A.C.R.C. Notes. Acts 1993, No. 168, § 1 provided: "Retroactive to January 1, 1993 the Judicial District Seventeenth-East Division B Prosecuting Attorney shall be reclassified as a Division A Judicial District Prosecuting Attorney."

As originally enacted by Acts 1993, No.

1306, § 1, this section ended "effective January 1, 1993."

Acts 1999, No. 456, § 7, provided: "Subject to review by the Senate Interim Committee on Judiciary of the Arkansas General Assembly, the Arkansas Code Revision Commission is authorized and directed to prepare a technical corrections bill for introduction in the next regular or

special session of the Arkansas General Assembly to make the necessary changes to the Arkansas Code of 1987 Annotated consistent with the provisions of this act. Specifically, in addition to other necessary changes determined to be consistent with this act and subject to review by the Senate Interim Committee on Judiciary, the Arkansas Code Revision Commission shall prepare legislation to change references to the Seventeenth Judicial District-East and the Seventeenth Judicial District-West, as well as similar and related references used throughout the Arkansas Code of 1987 Annotated to references consistent with the Seventeenth Judicial District and the Twenty-Third Judicial District, or divisions thereof, for purposes of uniformity and style."

16-21-140. The Twenty-third Judicial District.

The Twenty-third Judicial District shall be a Division B Judicial District.

History. Acts 1993, No. 1306, § 1; 1999, No. 456, § 6.

A.C.R.C. Notes. As originally enacted by Acts 1993, No. 1306, § 1, this section ended "effective January 1, 1993."

Acts 1999, No. 456, § 7, provided: "Subject to review by the Senate Interim Committee on Judiciary of the Arkansas General Assembly, the Arkansas Code Revision Commission is authorized and directed to prepare a technical corrections bill for introduction in the next regular or special session of the Arkansas General Assembly to make the necessary changes to the Arkansas Code of 1987 Annotated consistent with the provisions of this act. Specifically, in addition to other necessary changes determined to be consistent with this act and subject to review by the Senate Interim Committee on Judiciary, the Arkansas Code Revision Commission shall prepare legislation to change references to the Seventeenth Judicial District-East and the Seventeenth Judicial Dis-

Acts 1999, No. 456, § 8, provided: "Nothing in this Act shall be construed to decrease the term of office of the judges and prosecuting attorneys of the Seventeenth Judicial District-East or the Seventeenth Judicial District-West serving on the effective date of this Act. The judges and prosecuting attorneys shall continue to serve in their respective capacities in the Seventeenth Judicial District and the Twenty-Third Judicial District until the expiration of their terms."

Amendments. The 1999 amendment substituted "Seventeenth Judicial District" for "Seventeenth Judicial District-East."

trict-West, as well as similar and related references used throughout the Arkansas Code of 1987 Annotated to references consistent with the Seventeenth Judicial District and the Twenty-Third Judicial District, or divisions thereof, for purposes of uniformity and style."

Acts 1999, No. 456, § 8, provided: "Nothing in this Act shall be construed to decrease the term of office of the judges and prosecuting attorneys of the Seventeenth Judicial District-East or the Seventeenth Judicial District-West serving on the effective date of this Act. The judges and prosecuting attorneys shall continue to serve in their respective capacities in the Seventeenth Judicial District and the Twenty-Third Judicial District until the expiration of their terms."

Amendments. The 1999 amendment substituted "Twenty-third Judicial District" for "Seventeenth Judicial District-West."

16-21-141. The Eighteenth Judicial District-East.

The Eighteenth Judicial District-East shall be a Division A Judicial District.

History. Acts 1993, No. 1306, § 1.

A.C.R.C. Notes. As originally enacted by Acts 1993, No. 1306, § 1, this section ended "effective January 1, 1993."

Acts 1988 (3rd Ex. Sess.), No. 12, § 1,

provides that the Eighteenth Judicial District-East Judicial District shall be a Division B Judicial District until January 1, 1989; at that time, the district shall become a Division A Judicial District.

16-21-142. The Eighteenth Judicial District-West.

The Eighteenth Judicial District-West shall be a Division A Judicial District.

History. Acts 1993, No. 1306, § 1.

A.C.R.C. Notes. Acts 1993, No. 844, § 1, provided: "Retroactive to January 1, 1993 the Judicial District Eighteenth-West Division B Prosecuting Attorney

shall be reclassified as a Division A Judicial District Prosecuting Attorney."

As originally enacted by Acts 1993, No. 1306, § 1, this section ended "effective January 1, 1993."

16-21-143. The Nineteenth Judicial District.

The Nineteenth Judicial District shall be a Division A Judicial District.

History. Acts 1993, No. 1306, § 1.

A.C.R.C. Notes. As originally enacted

by Acts 1993, No. 1306, § 1, this section ended "effective January 1, 1993."

16-21-144. The Twentieth Judicial District.

The Twentieth Judicial District shall be a Division A Judicial District.

History. Acts 1993, No. 1306, § 1.

A.C.R.C. Notes. As originally enacted by Acts 1993, No. 1306, § 1, this section ended "effective January 1, 1993."

Acts 1987, No. 76, § 1, provided that the Third and Sixteenth Judicial Districts are Division A districts retroactive to January 1, 1987, the Eighth Judicial District

is a Division A district as of March 1, 1987, the Seventh and Twentieth Judicial Districts are Division A districts as of July 1, 1987, the Eighth Judicial District will remain a Division B district until March 1, 1987, and the Seventh and Twentieth Judicial Districts will remain Division B districts until July 1, 1987.

16-21-145. Authority to appoint deputies and employees.

Prosecuting attorneys shall have the power to appoint all deputies and employees without confirmation of any court or tribunal.

History. Acts 1993, No. 1306, § 2.

Cross References. Appointment of deputies generally, § 16-21-113.

Restriction on publication of report, § 21-7-401.

CASE NOTES

Cited: Villines v. Tucker, 324 Ark. 13, 918 S.W.2d 153 (1996).

16-21-146. Appropriation of funds for salaries and expenses.

(a) The quorum courts of the respective counties of a judicial district shall annually appropriate sufficient amounts to cover the salaries and expenses of the prosecuting attorney's office.

(b) The quorum courts of the respective counties may appropriate any additional funds and create such additional deputy prosecutor positions as they deem necessary for the efficient operation of the office of the prosecuting attorney.

History. Acts 1993, No. 1306, § 3.

CASE NOTES

Cited: Villines v. Tucker, 324 Ark. 13, 918 S.W.2d 153 (1996).

16-21-147. Powers of deputy prosecuting attorney — Disposition of federal forfeiture funds.

(a) A deputy prosecuting attorney who is duly appointed in any county of a judicial district shall, with the prosecuting attorney's consent, have the authority to perform all official acts as a deputy prosecuting attorney in all counties within the district.

(b)(1) A prosecuting attorney and those deputy prosecuting attorneys and other staff members he designates shall be considered law enforcement officers for the purposes of utilizing emergency, protective, and communication equipment in coordination with interagency cooperative investigations and operations.

(2) Provided, that the prosecuting attorney and all members of his office shall have no greater arrest powers than those accorded all citizens under the Arkansas Constitution and the Arkansas Code.

(c) A prosecuting attorney shall have the power to appoint deputy prosecuting attorneys and other employees at such salaries as are authorized in the grant awards from the Department of Finance and Administration's Drug Law Enforcement Program, Anti-Drug Abuse Act of 1986, as amended, or its successor.

(d) All federal forfeitures to a prosecuting attorney's office shall be deposited in a separate account pursuant to § 5-64-505(i)(4).

History. Acts 1993, No. 1306, § 4; 1999, No. 1120, § 7.

A.C.R.C. Notes. References to "this chapter" in subchapters 1-25 may not apply to §§ 16-21-121, 16-21-145 — 16-21-158 and 16-21-1702 — 16-21-1704, which were enacted subsequently.

Publisher's Notes. Acts 1999, No. 1120, § 1, provided: "Legislative intent. As stated in the comment to section 505 of the Uniform Controlled Substances Act, 'Effective law enforcement demands that there be a means of confiscating the vehicles and instrumentalities used by drug

traffickers in committing violations under this act. The reasoning is to prevent their use in the commission of subsequent offenses involving transportation or concealment of controlled substances and to deprive the drug trafficker of needed mobility.' The General Assembly recognizes the importance of asset forfeiture as a means to confront drug trafficking. However, the General Assembly also recognizes that under the system that existed prior to the enactment of this act, the lack of uniformity and accountability in forfeiture procedures across the state has undermined confidence in the system. As the United States Supreme Court has stated, 'Forfeiture provisions are powerful weapons in the war on crime; like any such weapons, their impact can be devastating when used unjustly.' In order to alleviate the problems resulting from the lack of uniformity and accountability, the General Assembly has determined that time limits for initiating forfeiture proceedings and stricter controls over forfeited property will help alleviate such problems while strengthening forfeiture as a vital weapon against drug trafficking. Specifically, it is the intent of § 5-64-505(a) that there be no forfeitures based solely upon a misdemeanor possession of a controlled substance. However, if the prosecuting attorney can prove that other evidence exists to establish a basis for forfeiture, the property may be forfeited. It is the

intent of § 5-64-505(d) to reduce the conflict between state and federal authorities over seizures executed by state law enforcement officers. It is the intent of § 5-64-505(h) to allow law enforcement agencies and drug task forces to maintain forfeited property for official use, provided that the final order disposing of such property defines the legal entity that is responsible for such property. Section 5-64-505(i)(1)(D) governs those situations in which a seizure results in the forfeiture of money and or property in excess of two hundred fifty thousand dollars (\$250,000). It is the specific intent of the General Assembly that forfeiture proceedings not be structured in such a way as to defeat the General Assembly's intent that money or property in excess of two hundred fifty thousand dollars (\$250,000) be transferred to the Special State Assets Forfeiture Fund. It is determined that such fund can best be used to combat drug trafficking statewide."

Amendments. The 1999 amendment substituted "deposited in a separate account pursuant to § 5-64-505(i)(4)" for "deposited in the drug control fund" in (d).

U.S. Code. The Anti-Drug Abuse Act of 1986, referred to in this section, is P.L. 99-570 and is codified throughout the U.S. Code. Its successor is the Anti-Drug Abuse Act of 1988, P.L. 100-690 which is also codified throughout the U.S. Code.

16-21-148. Deputy prosecutor for civil asset forfeiture actions.

(a) In addition to the deputy prosecuting attorney positions created by § 16-21-113(a)(1) and other Arkansas Code provisions and laws, a prosecuting attorney shall have the power to enter into a contract for personal services with a licensed attorney whose duty it will be to act as a deputy prosecutor to prosecute civil asset forfeiture actions at such hourly amount as is deemed proper by the prosecuting attorney.

(b) This attorney may be paid from funds generated from § 5-64-505(i)(2).

History. Acts 1993, No. 1306, § 5; 1999, No. 1120, § 5.

A.C.R.C. Notes. References to "this chapter" in subchapters 1-25 may not apply to §§ 16-21-121, 16-21-145 — 16-21-158 and 16-21-1702 — 16-21-1704, which were enacted subsequently.

Publisher's Notes. Acts 1999, No. 1120, § 1, provided: "Legislative intent.

As stated in the comment to section 505 of the Uniform Controlled Substances Act, 'Effective law enforcement demands that there be a means of confiscating the vehicles and instrumentalities used by drug traffickers in committing violations under this act. The reasoning is to prevent their use in the commission of subsequent offenses involving transportation or con-

cealment of controlled substances and to deprive the drug trafficker of needed mobility.' The General Assembly recognizes the importance of asset forfeiture as a means to confront drug trafficking. However, the General Assembly also recognizes that under the system that existed prior to the enactment of this act, the lack of uniformity and accountability in forfeiture procedures across the state has undermined confidence in the system. As the United States Supreme Court has stated, 'Forfeiture provisions are powerful weapons in the war on crime; like any such weapons, their impact can be devastating when used unjustly.' In order to alleviate the problems resulting from the lack of uniformity and accountability, the General Assembly has determined that time limits for initiating forfeiture proceedings and stricter controls over forfeited property will help alleviate such problems while strengthening forfeiture as a vital weapon against drug trafficking. Specifically, it is the intent of § 5-64-505(a) that there be no forfeitures based solely upon a misdemeanor possession of a controlled substance. However, if the prosecuting attorney can prove that other evidence exists to establish a basis for forfeiture, the property may be forfeited. It is the

intent of § 5-64-505(d) to reduce the conflict between state and federal authorities over seizures executed by state law enforcement officers. It is the intent of § 5-64-505(h) to allow law enforcement agencies and drug task forces to maintain forfeited property for official use, provided that the final order disposing of such property defines the legal entity that is responsible for such property. Section 5-64-505(i)(1)(D) governs those situations in which a seizure results in the forfeiture of money and or property in excess of two hundred fifty thousand dollars (\$250,000). It is the specific intent of the General Assembly that forfeiture proceedings not be structured in such a way as to defeat the General Assembly's intent that money or property in excess of two hundred fifty thousand dollars (\$250,000) be transferred to the Special State Assets Forfeiture Fund. It is determined that such fund can best be used to combat drug trafficking statewide."

Amendments. The 1999 amendment substituted "§ 5-64-505(i)(2)" for "§ 5-64-505(k)(4)" in (b).

Cross References. Property subject to forfeiture — Procedure — Disposition of property, § 5-64-505.

16-21-149. Appointment of special deputy prosecuting attorneys.

(a) Notwithstanding any other provision of law, the prosecuting attorney in every judicial district is authorized to appoint as special deputy prosecuting attorneys:

(1) Persons employed as attorneys in the office of the Prosecutor Coordinator; or

(2)(A) With the consent of the Attorney General, persons employed as attorneys in the office of the Attorney General.

(B) In cases involving the appointment of a staff attorney from the office of the Attorney General, the authority conferred by the appointment is limited to the matter for which the appointment is sought.

(b) Appointment as a special deputy prosecuting attorney under this section shall not enable an attorney employed in the office of the Attorney General to receive any additional fees or salary from the state or counties for services provided pursuant to the appointment.

(c) The prosecuting attorney may revoke the appointment of a special prosecuting attorney under this section at any time.

(d) Nothing in this section shall obligate the Attorney General to provide an attorney for purposes of assisting the prosecuting attorney in criminal actions designated in subsection (b) of this section, and

nothing in this section shall prevent the Attorney General from withdrawing from participation in such cases at any time.

History. Acts 1993, No. 1306, § 6; 1999, No. 1300, § 1.

A.C.R.C. Notes. The reference in subsection (d) to “subsection (b)” is in error.

Amendments. The 1999 amendment rewrote this section.

Cross References. Prosecutor Coordinator Act, § 16-21-201 et seq.

16-21-150. Prosecution of appeals.

No prosecuting attorney shall prosecute city misdemeanor cases or appeals to circuit or appellate courts unless the prosecuting attorney consents to do so.

History. Acts 1993, No. 1306, § 7.

A.C.R.C. Notes. As originally enacted by Acts 1993, No. 1306, § 7, this section

began “From and after the effective date of this act.” Acts 1993, No. 1306, § 7 was effective August 13, 1993.

16-21-151. Prosecutor’s victim/witness fund.

(a) In those offices where the prosecuting attorney is desirous of paying for the victim/witness program from more than one (1) county or fund, the prosecuting attorney may establish a cash account.

(b) Notice of such shall be sent by the prosecuting attorney to the applicable county treasurers.

(c) Each month the county treasurers shall pay to the office of the prosecuting attorney those funds collected pursuant to § 16-21-106 in the special revenue account entitled “Prosecutor’s victim/witness fund” or the portion of the county administration of justice fund allotted to the prosecuting attorney’s victim/witness program fund.

(d)(1) The prosecuting attorney shall deposit the funds in a bank account entitled “prosecutor’s victim/witness fund”.

(2) Moneys deposited into the fund shall be used exclusively to pay the costs of the prosecuting attorney’s victim/witness program.

(e) Expenditures and deposits must be made according to the Arkansas Prosecuting Attorneys Financial Management Guidelines as published by the Division of Legislative Audit in conjunction with the Prosecution Coordination Commission.

History. Acts 1995, No. 1221, § 1.

A.C.R.C. Notes. References to “this subchapter” in §§ 16-21-101 — 16-21-150 may not apply to this section which was enacted subsequently.

As enacted by Acts 1995, No. 1221, § 1, subsection (c) of this section also provided that the county treasurers shall pay to the

office of the prosecuting attorney those funds in the prosecutor’s victim/witness fund “if created by the legislature in 1995.”

The General Assembly created the county administration of justice fund by Acts 1995, No. 1256, § 10, codified as § 16-10-307.

16-21-152. The Twenty-first Judicial District.

The Twenty-first Judicial District shall be a Division A Judicial District.

History. Acts 1995, No. 900, § 6; 1997, No. 865, § 1.

A.C.R.C. Notes. As enacted, this section began: "At the 1996 General Election the qualified electors of Crawford County shall elect a person who shall serve as the prosecuting attorney for the Twenty-First Judicial District beginning January 1, 1997."

References to "this subchapter" in §§ 16-21-101 — 16-21-158 may not apply to this section which was enacted subsequently.

Amendments. The 1997 amendment added "Effective January 1, 1997"; and substituted "Division A" for "Division B."

16-21-153. License — Confirmation — Vacancies.

(a) Each person selected as a deputy prosecuting attorney shall be licensed to practice law in the State of Arkansas.

(b) Deputy prosecuting attorneys shall be appointed by elected prosecuting attorneys without confirmation of any court or tribunal and may be removed at any time by the prosecuting attorneys appointing them.

(c) Vacancies in the office of deputy prosecuting attorney shall be filled in the same manner as the initial appointment.

History. Acts 1999, No. 1044, § 3.

A.C.R.C. Notes. Acts 1999, No. 1044, § 8, provided: "LEAVE BENEFITS. Deputy prosecuting attorneys who convert from county or grant funded employment

to state employment and are employed prior to July 1, 1999, shall have their length of service with the county recognized for purposes of accrual rates for sick leave and annual leave."

16-21-154. Entry-level salary.

The entry level salaries of deputy prosecuting attorneys shall be consistent with that established by the state pay plan for the appropriate grade of each position.

History. Acts 1999, No. 1044, § 4.

16-21-155. Attendance and leave.

The deputy prosecuting attorneys shall be subject to the Uniform Attendance and Leave Policy Act, § 21-4-201 et seq., as administered by the elected prosecuting attorneys by whom they are employed.

History. Acts 1999, No. 1044, § 5.

16-21-156. Funding of expenses and additional employees of the prosecuting attorneys' offices.

Each county or counties within a judicial district shall continue to bear the responsibility and expense of providing, at the county's expense through an annual appropriation, the following, at sufficient levels for operation, but not less than the amounts appropriated by ordinance in effect January 1, 1999:

(1) The cost of facilities, equipment, supplies, salaries and benefits of existing support staff, and other office expenses for elected prosecuting

attorneys and deputy prosecuting attorneys, and any and all other line item appropriations as approved in the 1999 county budget except for deputy prosecuting attorneys' salaries and benefits; and

(2) The county shall provide compensation of additional personnel and expenses within the office of prosecuting attorney and deputy prosecuting attorney, when approved by the quorum court.

History. Acts 1999, No. 1044, § 10..

16-21-157. State employment and assignment of positions.

(a) On January 1, 2000, all deputy prosecuting attorneys shall become state employees.

(b) The number of positions authorized by this section equal the total number of county and grant-funded deputy prosecuting attorney positions in place as of January 1, 1999, less one (1) position.

(c)(1) The initial allocation of the state funded deputy prosecuting attorney positions for the 1999-2001 biennium shall be determined by the Prosecution Coordination Commission and shall be consistent with the number of county and grant funded positions in place for each judicial district as of January 1, 1999, less one (1) position.

(2) The final allocations shall be reported to the Legislative Council for its review prior to July 1, 1999.

History. Acts 1999, No. 1044, § 11.

16-21-158. Hour limitations — Part-time deputy prosecuting attorneys.

There are no upper limit restrictions on the number of hours which a part-time deputy prosecuting attorney may work.

History. Acts 1999, No. 1044, § 12.

SUBCHAPTER 2 — PROSECUTOR COORDINATOR ACT

SECTION.

16-21-201. Title.

16-21-202. Existing duties of prosecuting attorneys unaffected by subchapter.

16-21-203. Prosecution Coordination Commission.

16-21-204. Prosecutor Coordinator.

SECTION.

16-21-205. Fee reports.

16-21-206. Additional duties of commission.

16-21-207. Peer review of the prosecution and law enforcement block grants of the Violence Against Women Act.

A.C.R.C. Notes. References to "this subchapter" in §§ 16-21-201 — 16-21-205 may not apply to §§ 16-21-206 and 16-21-207 which were enacted subsequently.

16-21-201. Title.

This subchapter shall be known as the "Prosecutor Coordinator Act of 1975".

History. Acts 1975, No. 925, § 1; A.S.A. 1947, § 24-126.

16-21-202. Existing duties of prosecuting attorneys unaffected by subchapter.

No provision in this subchapter shall be construed to be in derogation of the already existing duties, authorities, responsibilities, or discretions of the various prosecuting and deputy prosecuting attorneys of this state.

History. Acts 1975, No. 925, § 4; A.S.A. 1947, § 24-129.

Cross References. Authority of prosecuting attorney to appoint the attorneys of

the Prosecutor Coordinator's Office as deputy prosecuting attorneys, § 16-21-149.

16-21-203. Prosecution Coordination Commission.

(a)(1) There is created a Prosecution Coordination Commission which shall be composed of seven (7) prosecuting attorneys elected by the prosecuting attorneys of the various judicial districts of this state from among their own members.

(2) The Prosecution Coordination Commission shall be elected by the prosecuting attorneys according to rules adopted by them for a term of one (1) year which shall run from January 1 through December 31 of each year.

(b) The commission members shall select from among their members a chairman, and they shall establish rules and procedures for the effective performance of their duties and responsibilities as set forth in this subchapter.

(c) The commission shall have the following duties and responsibilities:

(1) Accept and evaluate applications for the position of Prosecutor Coordinator and, by a majority vote of its members, appoint from among the applicants considered a Prosecutor Coordinator who shall serve in such capacity at the pleasure of the commission. However, any person serving in the capacity of Prosecutor Coordinator at any of the various times that the commission is elected pursuant to this section may continue to so serve, at the pleasure of the newly elected commission, without further consideration of other applicants;

(2) Advise the Prosecutor Coordinator as to the immediate needs and priorities of the prosecution function throughout the state;

(3) Establish the various duties and responsibilities of the Prosecutor Coordinator beyond those set forth in this subchapter;

(4) Develop long-range educational services and other support programs for the various prosecuting attorneys of this state;

(5) Serve as an advisory committee to the Prosecutor Coordinator for the production and supplementation of an office and trial manual and standardized criminal litigation forms; and

(6) Render assistance and advice in the investigation of organized crime as requested by any organized crime prevention council which may be created on a statewide basis.

History. Acts 1975, No. 925, § 2;
A.S.A. 1947, § 24-127.

16-21-204. Prosecutor Coordinator.

(a) There is created the position of Prosecutor Coordinator which shall be filled as specified in § 16-21-203.

(b) In addition to any other duties and responsibilities established by the commission, the Prosecutor Coordinator, for the benefit of the prosecuting attorneys of this state, shall:

(1) Produce and promote in-state training and continuing education programs at such intervals as shall be determined by the commission;

(2) Coordinate interjudicial district investigation and prosecution of organized criminal activities as so requested by police or prosecuting officials of this state or by any organized crime prevention council which may be created;

(3) Develop and supplement, in conjunction with the Criminal Justice Division of the Office of the Attorney General, an office and trial manual, standardized criminal litigation forms, and a comprehensive criminal law brief bank;

(4) Maintain a crisis center for emergency research for and assistance to prosecutors at trial; and

(5) Facilitate an exchange of information between the various prosecuting and deputy prosecuting attorneys and the Office of the Attorney General in the preparation of criminal appeals and in any other matter of mutual concern.

History. Acts 1975, No. 925, § 3;
A.S.A. 1947, § 24-128.

16-21-205. Fee reports.

(a)(1) All agencies and public officials receiving fees pursuant to § 5-37-307 or § 16-21-120 shall submit a report to the Prosecutor Coordinator's office monthly.

(2) The Prosecution Coordination Commission shall determine the contents of the report.

(3) This report shall be reviewed by the Prosecutor Coordinator's office.

(b)(1) After three (3) months where the accounts and accounting systems are not reconciled or reports are not received by the Prosecution Coordination Commission, the commission shall have the authority, after a hearing, to suspend an agency's or officer's ability to have a

hot check program for failure to comply with good governmental accounting procedures and practices and the reporting requirement mandated by this section.

(2) Any entity with a program suspended shall be reported to the Legislative Joint Auditing Committee.

History. Acts 1993, No. 1306, § 12.

Knowingly issuing worthless checks,

Cross References. Fees from issuing § 5-37-307.
bad checks, § 16-21-120.

16-21-206. Additional duties of commission.

In addition to existing duties, the Prosecution Coordination Commission may:

(1) Administer and disburse federal funds, grants, donations, and funds from public and private sources to carry out its responsibilities;

(2) Educate professionals, law enforcement, judges, state agencies, and victim services providers on:

(A) The role of the Arkansas Prosecuting Attorneys Association;

(B) The impact of crime on victims; and

(C) Prosecutor victim advocacy services;

(3) Maintain information on criminal justice information systems for prosecuting attorneys and victim services;

(4) Advise the Governor and the General Assembly as to the long-range and short-range goals and needs concerning crime rates and the criminal justice system and its impact on the victims of crime;

(5) Provide support, coordination, education, and technical assistance on issues of concern to prosecuting attorneys and crime victim services providers;

(6) Provide support, coordination, technical assistance, and training in accounting, programmatic, and service delivery to subgrantees;

(7) Establish peer-review panels in the course of the award and administration of grants; and

(8) Approve the expenditure of funds from the Law Enforcement and Prosecutor Drug Enforcement Training Fund.

History. Acts 1995, No. 1221, § 2.

may not apply to this section which was

A.C.R.C. Notes. References to "this subchapter" in §§ 16-21-201 — 16-21-205

enacted subsequently.

16-21-207. Peer review of the prosecution and law enforcement block grants of the Violence Against Women Act.

(a) The Prosecution Coordination Commission, in conjunction with two (2) representatives from the Arkansas Coalition Against Violence to Women and Children and one (1) representative from the sexual assault victim providers, shall conduct the peer-review process of the subgrant application for the prosecution percentage of the prosecution and law enforcement block grants of the Violence Against Women Act.

(b) The nonprosecution and law enforcement percentage shall be reviewed by nine (9) panelists, selected each federal grant year, to be determined as follows:

(1) Each of the four (4) regions of the Arkansas Coalition Against Violence to Women and Children shall select one (1) individual to serve as a peer-review panelist;

(2) The Executive Director of the Arkansas Coalition Against Violence to Women and Children shall also serve as a panelist;

(3) All of the nonprofit rape crisis centers in the state shall hold a meeting annually and select two (2) representatives to serve on the peer-review panel;

(4) The Prosecution Coordination Commission shall select a representative; and

(5) The Criminal Justice Institute Advisory Board shall select one (1) representative.

(c) The twenty-five percent (25%) designated to law enforcement shall be reviewed by:

(1) The Criminal Justice Institute Advisory Board;

(2) One (1) representative for the Prosecution Coordination Commission;

(3) Two (2) representatives from the Arkansas Coalition Against Violence to Women and Children; and

(4) One (1) representative from the sexual assault service providers.

History. Acts 1995, No. 1221, § 3.

U.S. Code. The Violence Against Women Act, referred to in this section, is codified as a note to 42 U.S.C. § 13701.

A.C.R.C. Notes. References to "this subchapter" in §§ 16-21-201 — 6-21-205 may not apply to this section which was enacted subsequently.

SUBCHAPTERS 3 -5

[Reserved]

SUBCHAPTER 6 — FIRST JUDICIAL DISTRICT

SECTION.

16-21-601. Contingent expense allowance.

Effective Dates. Acts 1983, No. 249, §§ 3, 4: effective retroactive to Sept. 1, 1982, for Monroe County; retroactive to Jan. 1, 1983, for other counties. Emergency clause provided: "It has been ascertained and determined by the General Assembly of the State of Arkansas that the expense allowance now provided by law for the prosecuting attorney of the First Judicial Circuit is inadequate to

reimburse said prosecuting attorney for expenses incurred in the performance of his duties and that it is essential to the effective and efficient administration of justice in the First Judicial Circuit that the expense allowance of said prosecuting attorney be increased immediately. Therefore, an emergency is hereby declared to exist and this Act being necessary for the immediate preservation of the public

peace, health and safety, shall be in full force and effect from and after its passage and approval.” Became law without Governor’s signature, Feb. 24, 1983.

16-21-601. Contingent expense allowance.

In lieu of any other contingent expense allowance provided by law for the Prosecuting Attorney of the First Judicial District, the prosecuting attorney shall receive an expense allowance to be borne by the respective counties of the First Judicial District as follows:

- (1) Cross County Such amount as may be approved by the Quorum Court of Cross County, not to exceed one thousand dollars (\$1,000) per annum;
- (2) Lee County Such amount as may be approved by the Quorum Court of Lee County, not to exceed one thousand dollars (\$1,000) per annum;
- (3) Monroe County Such amount as may be approved by the Quorum Court of Monroe County, not to exceed one thousand eight hundred dollars (\$1,800) per annum;
- (4) Phillips County Such amount as may be approved by the Quorum Court of Phillips County, not to exceed one thousand eight hundred dollars (\$1,800) per annum;
- (5) St. Francis County Such amount as may be approved by the Quorum Court of St. Francis County, not to exceed one thousand eight hundred dollars (\$1,800) per annum; and
- (6) Woodruff County Such amount as may be approved by the Quorum Court of Woodruff County, not to exceed one thousand four hundred dollars (\$1,400) per annum.

History. Acts 1983, No. 249, § 1; A.S.A. 1947, § 24-114.12.

SUBCHAPTER 7 — SECOND JUDICIAL DISTRICT

SECTION.
16-21-701. Expense allowance.
16-21-702. Disposition of fees — Payment of expenses.

SECTION.
16-21-703. Collection of fees.

A.C.R.C. Notes. Acts 1989 (3rd Ex. Sess.), No. 96, § 1, provided: “In addition to the deputy prosecutor positions created by Arkansas Code Annotated § 16-21-113

and other Arkansas Code provisions, the prosecuting attorney of the Second Judicial District shall have the power to appoint deputy prosecuting attorneys, inves-

tigators, case coordinators or employees at such salaries as are authorized in the grant awards from the Department of Finance and Administration, Intergovernmental Services, Drug Law Enforcement Program, Anti-Drug Abuse Act of 1986. The investigators and case coordinators shall have jurisdiction throughout the judicial district served, and have the power granted to peace officers by the statutes of this State and may serve process issuing out of all courts within the judicial district."

Publisher's Notes. Acts 1989 (3rd Ex. Sess.), No. 96, § 2, provided: "Nothing in this Act shall be construed to prohibit the quorum courts or city governing bodies of the Second Judicial District from providing additional personnel or funds, from whatever sources available, to the prosecuting attorney's office for the Anti-Drug Abuse program. Further, nothing in this Act shall be construed as to imply that the employees authorized herein are employees of the State of Arkansas."

Effective Dates. Acts 1981, No. 961, § 4: retroactive to Jan. 1, 1981. Became law without Governor's signature, April 8, 1981.

Acts 1987, No. 411, §§ 4, 6: retroactive to Jan. 1, 1987. Emergency clause provided: "It is hereby found and determined by the General Assembly that the salaries and contingent expense allowances provided for herein are immediately necessary to provide adequate compensation and allowances for the officers provided for herein to assure the effective and efficient administration of justice in the Second Circuit-Chancery Court Circuit and should be given effect immediately. Therefore, an emergency is hereby declared to exist and this act being neces-

sary for the immediate preservation of the public peace, health, and safety shall be in full force and effect from and after its passage and approval." Approved Mar. 25, 1987.

Acts 1991, No. 196, §§ 4, 7, 9: retroactive to January 1, 1991 and thereafter. Feb. 20, 1991. Emergency clause provided: "It is hereby found and determined by the General Assembly that the salaries and contingent expense allowances provided for herein are immediately necessary to provide adequate compensation and allowances for the officers provided for herein to assure the effective and efficient administration of justice in the Second Circuit-Chancery Court Circuit and should be given effect immediately. Therefore, an emergency is hereby declared to exist and this Act being necessary for the immediate preservation of the public peace, health and safety shall be in full force and effect from and after its passage and approval."

Acts 1995, No. 945, § 10: Apr. 6, 1995. Emergency clause provided: "It is hereby found and determined by the Eightieth General Assembly of the State of Arkansas that the salaries and contingent expense allowances, provided for herein are immediately necessary to provide adequate compensation and allowances for the officers provided for herein to assure the effective and efficient administration of justice in the Second Circuit-Chancery Court Circuit and should be given effect immediately. Therefore, an emergency is hereby declared to exist and this act being necessary for the immediate preservation of the public peace, health and safety shall be in full force and effect from and after its passage and approval."

16-21-701. Expense allowance.

(a)(1) The Prosecuting Attorney for the Second Judicial District shall be allowed the expenses of his office, including telephone, telegraph, postage, printing, office supplies and equipment, automobiles, office rent, and other expenses which, within the discretion of the prosecuting attorney, may be a proper expense of the office, and also including necessary expenses in connection with any proper investigation instant to any criminal law violation or trials before any grand jury or any court within the judicial district, coming within the duties of his office.

(2) The expenses provided for in subdivision (a)(1) of this section shall be borne by the counties comprising the Second Judicial District as follows:

(A) Clay County	\$2,300.00;
(B) Craighead County	\$8,500.00;
(C) Crittenden County	\$8,500.00;
(D) Greene County	\$2,703.96;
(E) Mississippi County	\$8,500.00; and
(F) Poinsett County	\$3,735.96.

(3) The expenses provided for in this subsection shall be paid on a monthly or quarterly basis by each county.

(b)(1)(A) The Prosecuting Attorney of the Second Judicial District may appoint one (1) or more deputy prosecuting attorneys for Crittenden County at a combined salary not to exceed one hundred seventy thousand dollars (\$170,000) per annum, and in such amounts within the total amounts provided in this subsection as may be designated by the prosecuting attorney, plus a combined contingent expense allowance in the amount established by the quorum court not to exceed fifty thousand dollars (\$50,000) per annum.

(B) The salaries provided for in this subsection shall be paid by the county court in twenty-four (24) semimonthly installments from the county general fund, and the expense allowance shall be paid monthly in an amount necessary to provide office rental, postage, printing, office supplies, equipment, stationery, secretarial assistance, automobile operation, and other proper expenses supported by written itemized claims filed by the deputy prosecuting attorney with the county judge and subject to the approval of the county judge.

(2)(A) Expenses actually incurred by the deputy prosecuting attorney or attorneys in Crittenden County in excess of the contingent expense allowance provided for such attorney or attorneys shall be paid upon itemized claims filed by such deputy or deputies.

(B) The expense and allowances provided in subdivision (b)(1) of this section shall be in addition to any necessary expense incurred in connection with any proper investigation incident to violations or alleged violations of the criminal laws or any hearing or trial before a grand jury or any court, including expenses of obtaining evidence and securing attendance of witnesses from within or outside of the State of Arkansas and any unusual travel expenses incurred in connection with the duties of his office, which shall be paid by the county from the county general revenue fund upon the filing of a proper claim by the deputy prosecuting attorney or by the person or firm entitled to compensation therefor and having the approval of the deputy prosecuting attorney, the prosecuting attorney, or the court in which such matter is pending.

(3) It is not the purpose of this subsection to repeal any laws now or hereafter enacted fixing the fees collectible as prosecuting attorney's fees, but rather to update and make possible a more efficient administration of justice and county government. All courts shall collect the fees

heretofore provided by law as prosecuting attorney's fees and all such fees collected shall be paid into the county treasury as required by law regarding funds belonging to the county. It is the explicit legislative intent to provide the salaries and expense allowances set forth in this subsection without regard to the amount of prosecuting attorney's fees and emoluments earned or collected in the counties affected by the subsection. However, nothing in this subsection shall be so interpreted as to preclude Crittenden County from paying additional expense allowances in addition to those enumerated in this subsection upon proper action of the appropriate quorum courts.

History. Acts 1981, No. 961, § 2; A.S.A. 1947, § 24-114.16; Acts 1987, No. 343, § 1; 1987, No. 411, § 1; 1991, No. 196, §§ 1, 5; 1995, No. 945, §§ 1-3, 5; 1999, No. 1038, § 1.

A.C.R.C. Notes. The operation of subdivision (b)(3) may be affected by the enactment of Acts 1995, No. 1256.

Acts 1995, No. 945, § 4, provided: "The provisions of this act shall be retroactive to January 1, 1995, and thereafter."

Acts 1995, No. 945, § 6, provided: "Beginning January 1, 1995 the clerk-secretary-case coordinator of the Ninth Circuit-Chancery Court Circuit West shall receive an annual salary of not less than sixteen thousand five hundred dollars (\$16,500), nor more than twenty-five thousand dollars (\$25,000). The salaries and expenses shall be paid by each county comprising the Ninth Circuit-Chancery Court Circuit West with the proportion to be paid by

each county to be determined by the judge of the Circuit with consideration of the assessed value of all real and personal property in each county, the population of each county, and the case load of the court in each county. The salary provided for in this act shall be paid by each county as herein specified in equal monthly payments on the first day of each month."

Amendments. The 1995 amendment repealed former (a)(2); redesignated former (b) and (c) as (a)(2) and (3); substituted "subdivision (a)(1)" for "subsection (a)" in present (a)(2); substituted "this subsection" for "this section" in present (a)(3); and added present (b).

The 1999 amendment substituted "one hundred seventy thousand dollars (\$170,000)" for "one hundred fifty thousand dollars (\$150,000)" in (b)(1)(A); and made stylistic changes.

16-21-702. Disposition of fees — Payment of expenses.

(a) All fees earned and payable to the deputy prosecuting attorneys in Crittenden County under laws now or hereafter in effect, including fees under the Arkansas Hot Check Law, § 5-37-301 et seq., shall be deposited in the county treasury and shall be credited to the county general fund.

(b) Expenses actually incurred by the deputy prosecuting attorney or attorneys in Crittenden County in excess of the contingent expense allowance provided for the attorney or attorneys shall be paid upon itemized claims filed by the deputy or deputies.

(c) The expenses and allowances provided in § 16-21-701(a)(2) shall be in addition to any necessary expense incurred in connection with any proper investigation incident to violations or alleged violations of the criminal laws or any hearing or trial before a grand jury or any court, including expenses of obtaining evidence and securing attendance of witnesses from within or outside of the State of Arkansas and any unusual travel expenses incurred in connection with the duties of his office, which shall be paid by the county from the county general

revenue fund upon the filing of a proper claim by the deputy prosecuting attorney, or by the person or firm entitled to compensation therefor and having the approval of the deputy prosecuting attorney, the prosecuting attorney, or the court in which the matter is pending.

History. Acts 1991, No. 196, § 2.

A.C.R.C. Notes. Former § 16-21-702, concerning the disposition of fees — payment of expenses, is deemed to be superseded by this section. The former section was derived from: Acts 1987, No. 411, § 2.

Publisher's Notes. Acts 1991, No. 196, § 4 provided that the provisions of the act shall be retroactive to January 1, 1991, and thereafter.

16-21-703. Collection of fees.

(a) It is not the purpose of this section, § 16-21-701(a)(2), and § 16-21-702 to repeal any laws now or hereafter enacted fixing the fees collectible as prosecuting attorneys' fees, but rather to update and make possible a more efficient administration of justice and county government.

(b) All courts shall collect the fees heretofore provided by law as prosecuting attorneys' fees, and all such fees collected shall be paid into the county treasury as required by law regarding funds belonging to the county.

(c) It is the explicit legislative intent to provide the salaries and expense allowances set forth in this section, § 16-21-701(a)(2), and § 16-21-702 without regard to the amount of prosecuting attorneys' fees and emoluments earned or collected in the counties affected by this section, § 16-21-701(a)(2), and § 16-21-702. However, nothing in this section, § 16-21-701(a)(2), and § 16-21-702 shall be so interpreted as to preclude Crittenden County from paying additional expense allowances in addition to those enumerated herein upon proper action of the appropriate quorum courts.

History. Acts 1991, No. 196, § 3.

A.C.R.C. Notes. Former § 16-21-703, concerning the collection of fees, is deemed to be superseded by this section. The former section was derived from: Acts 1987, No. 411, § 3.

Publisher's Notes. Acts 1991, No. 196, § 4, provided that the provisions of the act shall be retroactive to January 1, 1991, and thereafter.

SUBCHAPTER 8 — THIRD JUDICIAL DISTRICT

SECTION.

16-21-801. Contingent expense allowance.

Effective Dates. Acts 1981, No. 945, § 10: retroactive to Jan. 1, 1981.

Acts 1993, No. 240, § 5: Noted Feb. 26, 1993. Emergency clause provided: "It is hereby found and determined by the Gen-

eral Assembly that the present law establishing the salary of deputy prosecuting attorney for Randolph County is inadequate; that this act will give Randolph County more flexibility in setting the sal-

ary for its deputy prosecuting attorney; and that until this act goes into effect the county will not have the necessary flexibility for establishing an adequate salary for the deputy prosecuting attorney. Therefore, an emergency is hereby declared to exist and this act being necessary for the immediate preservation of the public peace, health and safety shall be in full force and effect from and after its passage and approval.”

Acts 1999, No. 1242, §§ 5, 6: effective retroactively to Jan. 1, 1999. Emergency clause provided: “It is hereby found and determined by the Eighty-second General Assembly that this act is essential to the operation of the criminal justice system within the Third Judicial District. It is

also determined that the prosecuting attorney of the Third Judicial District is in need of these personnel in order to fight the war on drugs and combat crime in the Third Judicial District. Therefore, an emergency is declared to exist and this act being immediately necessary for the preservation of the public peace, health and safety shall become effective on the date of its approval by the Governor. If the bill is neither approved nor vetoed by the Governor, it shall become effective on the expiration of the period of time during which the Governor may veto the bill. If the bill is vetoed by the Governor and the veto is overridden, it shall become effective on the date the last house overrides the veto.”

16-21-801. Contingent expense allowance.

(a) The office of the Prosecuting Attorney of the Third Judicial District shall receive not less than a contingent expense reimbursement for the expenses of his office, including, but not limited to, telephone, telegraph, postage, printing, office supplies and equipment, office rent, stationery, traveling expense, special service, operation of automobiles, and such other expense which, within the discretion of the prosecuting attorney, may be a proper expense of the office, and also including necessary expenses in connection with any proper investigation incident to any criminal law violation or trials before any grand jury or any court within the judicial district coming within the duties of his office.

(b) The expenses provided for in subsection (a) of this section shall be borne by the counties comprising the Third Judicial District as follows:

- (A) Jackson \$5,000 per year;
- (B) Lawrence \$5,000 per year;
- (C) Randolph \$5,000 per year;
- (D) Sharp \$5,000 per year;

(c)(1) The expenses provided for shall be paid in equal quarterly installments from each county general fund, and the checks shall be made payable to the office of the Prosecuting Attorney of the Third Judicial District.

(2) Disbursements shall be made by the prosecuting attorney for the necessary expenses of the office based upon adequate documentation.

(d)(1) Each deputy prosecuting attorney of the Third Judicial District shall receive a reimbursement for the expenses of his or her office, including, but not limited to, maintenance and operation, capital outlay, office supplies, telephone, postage, copying, insurance, and library.

(2)(A) Disbursements shall be made for the necessary expenses of the office based upon adequate documentation and upon appropriation of the respective county’s quorum court and approval of each respective county judge.

(B) The prosecuting attorney or deputies may also be allowed additional expenses upon appropriation of the quorum court and approval of each respective county judge.

(e) The Prosecuting Attorney of the Third Judicial District shall be entitled to the following assistants and employees:

(1)(A)(i) One (1) chief deputy prosecuting attorney, whose salary shall not be less than twenty-eight thousand seventy dollars (\$28,070) per annum.

(ii) The salary is to be paid in accordance with the pay periods and payroll policy for county employees of Jackson County.

(B) In addition to the salary, social security, matching retirement, insurance, and all related salary expenses shall be paid by Jackson County;

(2)(A)(i) One (1) deputy prosecuting attorney, whose salary shall not be less than twenty-four thousand three hundred fifty dollars (\$24,350) per annum.

(ii) The salary is to be paid in accordance with the pay periods and payroll for county employees of Lawrence County.

(B) In addition to the salary, social security, matching retirement, insurance, and all related salary expenses shall be paid by Lawrence County;

(3)(A)(i) One (1) deputy prosecuting attorney, whose salary shall not be less than twenty-one thousand seven hundred fifty dollars (\$21,750) per annum.

(ii) The salary is to be paid in accordance with the pay periods and payroll policy for county employees of Randolph County.

(B) In addition to the salary, social security, matching retirement, insurance, and all related salary expenses shall be paid by Randolph County;

(4)(A)(i) One (1) deputy prosecuting attorney, whose salary shall not be less than twenty thousand nine hundred dollars (\$20,900) per annum.

(ii) The salary is to be paid in accordance with the pay periods and payroll policy for county employees of Sharp County.

(B) In addition to the salary, social security, matching retirement, insurance, and all related salary expenses shall be paid by Sharp County;

(5)(A)(i) One (1) deputy prosecuting attorney, whose salary shall not be less than twenty thousand nine hundred dollars (\$20,900) per annum.

(ii) The salary is to be paid in accordance with the pay periods and payroll policy for county employees of Jackson County.

(B)(i) In addition to the salary, social security, matching retirement, insurance, and all related salary expenses shall be paid by Jackson County.

(ii) The counties of Lawrence, Randolph, and Sharp shall reimburse Jackson County for a pro rata share of the salary, social security, matching retirement, insurance, and all related salary expenses paid for this position;

(6)(A)(i) One (1) administrative assistant, whose salary shall not be less than twenty-four thousand five hundred dollars (\$24,500) per annum.

(ii) The salary is to be paid in accordance with the pay periods and payroll policy of Sharp County.

(B)(i) In addition to the salary, social security, matching retirement, insurance, and all related salary expenses shall be paid by Sharp County.

(ii) The counties of Lawrence, Randolph, and Jackson shall reimburse Sharp County for a pro rata share of the salary, social security, matching retirement, insurance, and all related salary expenses paid for this position;

(7)(A)(i) One (1) part-time secretary, whose salary shall not be less than ten thousand dollars (\$10,000) per annum.

(ii) The salary is to be paid in accordance with the pay periods and payroll policy of Jackson County.

(B) In addition to the salary, social security, matching retirement, insurance, and all related salary expenses shall be paid by Jackson County;

(8)(A)(i) One (1) part-time secretary, whose salary shall not be less than ten thousand dollars (\$10,000) per annum.

(ii) The salary is to be paid in accordance with the pay periods and payroll policy of Lawrence County.

(B) In addition to the salary, social security, matching retirement, insurance, and all related salary expenses shall be paid by Lawrence County;

(9)(A)(i) One (1) part-time secretary, whose salary shall not be less than ten thousand dollars (\$10,000) per annum.

(ii) The salary is to be paid in accordance with the pay periods and payroll policy of Randolph County.

(B) In addition to the salary, social security, matching retirement, insurance, and all related salary expenses shall be paid by Randolph County;

(10)(A)(i) One (1) part-time secretary, whose salary shall not be less than ten thousand dollars (\$10,000) per annum.

(ii) The salary is to be paid in accordance with the pay periods and payroll policy of Sharp County.

(B) In addition to the salary, social security, matching retirement, insurance, and all related salary expenses shall be paid by Sharp County; and

(11)(A)(i) One (1) part-time secretary, whose salary shall not be less than ten thousand dollars (\$10,000) per annum.

(ii) The salary is to be paid in accordance with the pay periods and payroll policy of Jackson County.

(B)(i) In addition to the salary, social security, matching retirement, insurance, and all related salary expenses shall be paid by Jackson County.

(ii) The counties of Lawrence, Randolph, and Sharp shall reimburse Jackson County for a pro rata share of the salary, social

security, matching retirement, insurance, and all related salary expenses paid for this position.

(f) Nothing in this section shall prevent or prohibit each quorum court in the respective counties in the Third Judicial District from appropriating additional positions, salaries, salary matching requirements, or expenses greater than the amounts mandated in this section should they deem it necessary to do so.

(g) The Prosecuting Attorney of the Third Judicial District shall be allowed additional assistance and employees in each county upon appropriation of the quorum court and approval of the county judge in each respective county.

History. Acts 1981, No. 945, §§ 8, 9; A.S.A. 1947, §§ 24-114.8b, 24-114.8c; Acts 1987, No. 120, §§ 1, 2; 1989, No. 394, § 1; 1993, No. 240, § 1; 1999, No. 1242, § 1.

A.C.R.C. Notes. As originally amended by Acts 1993, No. 240, § 1, subsection (d) also provided, in part, that the salary and expenses provided therein shall apply retroactively to January 1, 1993.

Amendments. The 1993 amendment, all in (d), substituted "a minimum of twelve thousand five hundred dollars (\$12,500) and a maximum of twenty thousand dollars (\$20,000)" for "eleven thousand dollars (\$11,000)," substituted "a

minimum of six thousand dollars (\$6,000) and a maximum of ten thousand dollars (\$10,000)" for "three thousand dollars (\$3,000)," and deleted the third sentence.

The 1999 amendment, in (a), inserted "Office of the" preceding "Prosecuting Attorney" and substituted "shall receive not less than a contingent expense reimbursement for the expenses of his office, including, but not limited to" for "shall be allowed the contingent expense of his office, including"; in (b), substituted "\$5,000" for "\$2,700" twice, "\$5,000" for "\$2,400" and "\$5,000" for "\$200"; rewrote (c) and (d); added (e)-(g); and made stylistic changes.

SUBCHAPTER 9 — FOURTH JUDICIAL DISTRICT

SECTION.

16-21-901. Office space, etc. — Contingent expense allowance.

Effective Dates. Acts 1981, No. 992, § 8: became law without Governor's signature, Apr. 8, 1981. Emergency clause provided: "It is hereby found and determined by the General Assembly of Arkansas that the increase in the volume of crime, together with the establishment and maintenance in Washington and Madison counties of municipal courts, circuit courts, juvenile courts, and additional county civil litigation all of which require

the services of the prosecuting attorney's office, that the personnel and funds previously authorized are now insufficient to pay the salaries and contingency expenses required of the prosecuting attorney's office. Therefore, an emergency is declared to exist, and this Act being necessary for the immediate preservation of the public peace, health and safety shall take effect and be in force from and after its passage and approval."

16-21-901. Office space, etc. — Contingent expense allowance.

(a) The Prosecuting Attorney of the Fourth Judicial District shall be furnished, by Washington County, suitable office space, telephone expenses, postage, printing, office supplies, and equipment.

(b)(1) In addition, the prosecuting attorney shall be allowed two thousand five hundred dollars (\$2,500) per annum as a contingent expense of his office for traveling expenses, special service, operation of automobiles, and such other expenses which, within the discretion of the prosecuting attorney, may be proper expenses of the office, and also including necessary expense in connection with any proper investigation incident to any criminal law violation or trials before any grand jury, or any court within the Fourth Judicial District, coming within the duties of his office.

(2) The contingent expense is to be paid by Washington County in an amount of two thousand three hundred dollars (\$2,300) per year and Madison County in an amount of two hundred dollars (\$200) per year from the general revenue fund. However, the annual amount shall be paid in equal monthly installments by each county.

History. Acts 1981, No. 992, § 2;
A.S.A. 1947, § 24-114.7.

CASE NOTES

Cited: Villines v. Tucker, 324 Ark. 13,
918 S.W.2d 153 (1996).

SUBCHAPTER 10 — FIFTH JUDICIAL DISTRICT

SECTION.

16-21-1001. Operating expenses.

Effective Dates. Acts 1983, No. 485, §§ 8, 11: July 1, 1983. Emergency clause provided: "It is hereby found and determined by the General Assembly that there has been an increase in the rate of crime in the State and that in order to curb this rise in the crime rate and to promote the orderly administration of criminal justice in the Fifth Judicial Circuit, it is necessary that this Act become effective July 1, 1983."

Acts 1993, No. 878, § 12: Noted: Apr. 4, 1993. Emergency clause provided: "It is

hereby found and determined by the General Assembly that this act is essential to the operation of criminal justice within the Fifth Judicial District; that the Prosecuting Attorney of the Fifth Judicial Circuit is in need of personnel and expense funding in order to fight the war on crime. Therefore, an emergency is hereby declared to exist and this act being necessary for the immediate preservation of the public peace, health and safety shall be in full force and effect from and after its passage and approval."

16-21-1001. Operating expenses.

(a) The Prosecuting Attorney of the Fifth Judicial District shall be entitled to an operating expense of not less than seventeen thousand five hundred dollars (\$17,500) to cover the cost of printing, supplies, equipment, janitorial services, cleaning supplies, food, service contracts, accounting, postage, photocopies, travel, training, utilities, rent, juror and witness fees, and such other expenses which within the

discretion of the prosecuting attorney may be proper expenses of the office in connection with the investigation and prosecution of criminal activity within the district. Said expenses shall be paid in equal monthly installments from the Pope County general fund.

(b) At the end of each quarter, one-third ($\frac{1}{3}$) of said sum shall be reimbursed to Pope County by Johnson County and Franklin County equally, being one-sixth ($\frac{1}{6}$) each.

(c) In addition, the telephone bill shall be submitted to the county for payment, this payment to be in addition to the operating expenses set forth in subsection (a) of this section.

History. Acts 1983, No. 485, § 4; A.S.A. 1947, § 24-114.13a; Acts 1993, No. 878, § 3.

Amendments. The 1993 amendment deleted "telephone" following "accounting"

and made minor punctuation changes in the first sentence of (a), and added the second sentence; deleted former (b)(1); added "said" preceding "sum" in (b) and added (c).

SUBCHAPTER 11 — SIXTH JUDICIAL DISTRICT

SECTION.

- 16-21-1101. Applicability.
- 16-21-1102. Assistants and employees.
- 16-21-1103. Representation of Perry County.
- 16-21-1104. Additional personnel or funds.

SECTION.

- 16-21-1105. Supplemental funding.
- 16-21-1106. Local appropriation for Pulaski County Division.
- 16-21-1107. Appointment of employees.
- 16-21-1108. Federal funds.
- 16-21-1109. Hot check funds.

A.C.R.C. Notes. Acts 1997, No. 522, § 1, began: "Effective January 1, 1997 and thereafter, Arkansas Code Annotated Title 16, Chapter 21, Subchapter 11 is amended to read as follows:"

Publisher's Notes. Former subchapter 11 was repealed by Acts 1993, No. 997, § 8. The subchapter was derived from the following sources:

16-21-1101. Acts 1975, No. 870, § 1; A.S.A. 1947, § 24-119n.

16-21-1102. Acts 1975, No. 870, § 2; 1987, No. 542, §§ 1, 2; 1989, No. 656, §§ 1-3; 1991, No. 819, § 1.

16-21-1103. Acts 1989, No. 656, §§ 4, 9; 1991, No. 819, § 2.

16-21-1104. Acts 1989, No. 656, § 6.

16-21-1105. Acts 1989, No. 656, § 7.

16-21-1106. Acts 1989, No. 656, § 8.

16-21-1107. Acts 1989, No. 656, § 5.

16-21-1108. Acts 1991, No. 758, § 1.

Former § 16-21-1104 was also previously repealed by Acts 1991, No. 904, § 9.

Effective Dates. Acts 1995 (1st Ex. Sess.), No. 13, § 13: Oct. 23, 1995. Emergency clause provided: "It is hereby found and determined by the General Assembly

of the State of Arkansas that the current system of funding the state judicial system has created inequity in the level of judicial services available to the citizens of the state; and it is further determined that the current method of financing the state judicial system has become so complex as to make the administration of the system impossible, and the lack of reliable data on the current costs of the state judicial system prohibits any comprehensive change in the funding of the system at this time. Therefore, an emergency is hereby declared to exist and this act being necessary for the immediate preservation of the public peace, health, and safety, shall be in full force and effect from and after its passage and approval."

Acts 1999, No. 1234, § 7: Apr. 8, 1999, retroactive to January 1, 1999. Emergency clause provided: "It is hereby found and determined by the Eighty-second General Assembly that this act is essential to the operation of the criminal justice system within the Sixth Judicial District. It is also determined that the prosecuting attorney of the Sixth Judicial District is in

need of these personnel in order to fight the war on drugs and combat crime in the Sixth Judicial District. Therefore, an emergency is declared to exist and this act being immediately necessary for the preservation of the public peace, health and safety shall become effective on the date of its approval by the Governor. If the bill is

neither approved nor vetoed by the Governor, it shall become effective on the expiration of the period of time during which the Governor may veto the bill. If the bill is vetoed by the Governor and the veto is overridden, it shall become effective on the date the last house overrides the veto."

16-21-1101. Applicability.

This subchapter shall apply to the Sixth Judicial District, which is composed of Pulaski County and Perry County.

History. Acts 1993, No. 997, § 1; 1995, No. 803, § 1; 1997, No. 522, § 1.

The 1997 amendment made no change in this section.

Amendments. The 1995 amendment made no change in this section.

16-21-1102. Assistants and employees.

(a) The Prosecuting Attorney of the Sixth Judicial District shall be entitled to the following assistants and employees:

(1) To be paid by the county in which they serve:

(A) A minimum of thirty-five (35) deputy prosecuting attorneys, whose salaries shall be as follows:

(i) One (1) chief deputy at not less than seventy thousand three hundred fifty-five dollars (\$70,355);

(ii) Three (3) senior deputies at not less than forty-five thousand seven hundred one dollars (\$45,701);

(iii) A minimum of seven (7) division chiefs at not less than forty thousand one hundred dollars (\$40,100);

(iv) A minimum of eight (8) staff attorneys at not less than thirty-five thousand two hundred dollars (\$35,200);

(v) A minimum of fourteen (14) staff attorneys at not less than thirty thousand nine hundred dollars (\$30,900); and

(vi) Two (2) trial attorneys at not less than forty thousand one hundred dollars (\$40,100);

(B)(i) A minimum of eight (8) investigators as follows:

(a) One (1) chief investigator at not less than twenty-two thousand four hundred one dollars (\$22,401); and

(b) Seven (7) investigators at not less than twenty thousand seven hundred dollars (\$20,700).

(ii) In addition to the investigators listed in subdivision (a)(1)(B)(i) of this section by salary, the prosecuting attorney shall have the authority to appoint other investigators as necessary for the administration of justice who shall serve without pay.

(iii)(a) All investigators authorized and so appointed shall have the authority to issue process, serve warrants, and possess all law enforcement officer powers.

(b) They shall be certified by the Arkansas Commission on Law Enforcement Standards and Training and shall be defined as public safety members under Arkansas law.

(c) In the event that investigators shall issue process or serve warrants, the prosecutor's office shall be entitled to receive the same fee as provided in § 21-6-307, which shall be deposited into the hot check fees account;

(C) A minimum of forty-three (43) support personnel whose salaries shall be as follows:

(i) Two (2) lead case clerks at not less than sixteen thousand seven hundred dollars (\$16,700);

(ii) Twenty (20) case clerks at not less than fifteen thousand four hundred one dollars (\$15,401);

(iii) One (1) administrative coordinator at not less than thirty thousand nine hundred dollars (\$30,900);

(iv) One (1) budget administrator at not less than twenty-seven thousand one hundred dollars (\$27,100);

(v)(a) Two (2) executive secretaries who shall serve at the will of the prosecuting attorney.

(b) The executive secretaries shall receive a salary of not less than seventeen thousand nine hundred ninety-nine dollars (\$17,999);

(vi) One (1) hot check administrator at not less than twenty-two thousand four hundred one dollars (\$22,401);

(vii) Three (3) hot check accounting clerks III at not less than seventeen thousand nine hundred ninety-nine dollars (\$17,999);

(viii) One (1) victim assistance program coordinator at not less than twenty-seven thousand one hundred dollars (\$27,100);

(ix) One (1) volunteer coordinator at not less than twenty-four thousand six hundred dollars (\$24,600);

(x) A minimum of seven (7) victim assistance case coordinators at not less than seventeen thousand nine hundred ninety-nine dollars (\$17,999);

(xi) One (1) systems analyst at not less than thirty-four thousand four hundred dollars (\$34,400);

(xii) Two (2) youth resource officers at not less than seventeen thousand nine hundred ninety-nine dollars (\$17,999); and

(xiii) One (1) precharging division supervisor at not less than twenty-three thousand six hundred fifty-three dollars (\$23,653);

(2)(A) One (1) part-time deputy prosecuting attorney whose duties shall be to represent the office of the Prosecuting Attorney of the Sixth Judicial District in all cases involving food stamp fraud and Aid to Families with Dependent Children fraud referred to the prosecuting attorney by the Department of Human Services and any other responsibilities that may be delegated to him by the prosecuting attorney.

(B) The Prosecuting Attorney of the Sixth Judicial District shall contract with the Department of Human Services to determine the compensation of the deputy prosecuting attorney to be paid by the Department of Human Services.

(C) The part-time deputy prosecuting attorney so appointed shall be permitted to engage in the private practice of law in the area of civil cases only.

(D) At the discretion of the prosecuting attorney, this part-time deputy prosecuting attorney may be delegated other duties and made a full-time deputy prosecuting attorney and paid therefor from the existing appropriation for full-time deputy prosecuting attorneys;

(3) Four (4) deputy prosecuting attorneys, to be paid by the Prosecutor Coordinator and not through quorum court appropriations, to handle criminal and civil commitments, including involuntary admissions and alcohol and narcotic commitments and insanity acquittees and other deputy prosecuting attorney duties as requested;

(4) The prosecuting attorney may hire part-time, temporary, contract, or permanent paralegals, law clerks, or deputy prosecuting attorneys as authorized by the quorum court or provided for by law if deemed necessary for the proper administration of justice and for the efficient operation of the office of the Prosecuting Attorney of the Sixth Judicial District;

(5) The prosecuting attorney shall have the power to appoint additional deputy prosecuting attorneys and other employees at such salaries as are authorized in grant awards from the Department of Finance and Administration, including, but not limited to, the federal Drug Law Enforcement Program Anti-Abuse Act of 1986, as amended, or its successor, or any other grant funds so awarded; and

(6) In addition to the deputy prosecuting attorney positions created by this subchapter or any other Arkansas Code provisions, the Prosecuting Attorney of the Sixth Judicial District shall have the authority to contract at such salary or compensation amounts as may be available or appropriated by the quorum court for such legal services as are necessary, to include, but not be limited to, asset forfeiture actions.

(b)(1) The prosecuting attorney shall have the power to appoint the assistants and employees authorized in subsection (a) of this section without confirmation of any court or tribunal.

(2) Deputy prosecuting attorneys and other staff members so designated in this subchapter shall be considered law enforcement officers for all protective, emergency, investigative, and communication purposes, either individually or in coordination with interagency cooperative investigations and operations.

(3) Deputy prosecuting attorneys duly appointed shall have such authority as conferred by the prosecuting attorney to perform any official acts so designated in all counties within the district.

(4)(A) The Pulaski County Quorum Court shall annually appropriate funds sufficient to cover salaries, maintenance and operations expenditures, and capital outlay as required by the prosecuting attorney for the administration of justice.

(B) All of the salaries shall be paid by Pulaski County.

(C) When the Pulaski County Quorum Court raises salaries for Pulaski County employees, it shall also raise salaries an equivalent amount for the above employees.

(D) Those employees covered by this subchapter shall be treated by Pulaski County in the same manner as other Pulaski County employees for all other purposes.

History. Acts 1993, No. 997, § 2; 1995, No. 803, § 2; 1997, No. 522, § 1; 1999, No. 1234, § 1.

Amendments. The 1995 amendment rewrote (a); inserted the subdivision (b)(1) and (2) designations; and redesignated former (c) and (d) as (b)(3) and (4), respectively.

The 1997 amendment substituted “thirty-three (33)” for “thirty-two (32)” in (a)(1); rewrote (a)(1)(A); substituted “seven (7)” for “six (6)” in (a)(1)(C); substituted “thirty-four (34)” for “thirty-two (32)” in (a)(3); rewrote (a)(3)(D); substituted “Two (2) hot check account clerks” for “One (1) hot

check account clerk” in (a)(3)(G); added (a)(3)(K); inserted “and insanity acquittees and other deputy duties as requested” following “narcotic commitments” in (a)(4)(B); and made minor stylistic changes.

The 1999 amendment rewrote (a).

U.S. Code. The reference in this section to the Drug Law Enforcement Program Anti-Abuse Act of 1986 is probably a reference to a former version of 42 U.S.C. § 3796h, repealed in 1988, which contained provisions relating to grants for drug law enforcement programs.

CASE NOTES

Investigators.

The powers afforded to special investigators of the Sixth Judicial District who operate without pay under subdivision (a)(2)(C) of this section appear to be significant; such investigators are authorized to use their official powers throughout the district, not merely within the city boundaries where they are employed. *Mings v. State*, 316 Ark. 650, 873 S.W.2d 559 (1994).

In subdivision (a)(2)(C) of this section, the plain and ordinary meaning of the language “all law enforcement officer powers” includes without question the power to stop an individual suspected of driving while intoxicated and to detain him. *Mings v. State*, 316 Ark. 650, 873 S.W.2d 559 (1994).

16-21-1103. Representation of Perry County.

(a) The Prosecuting Attorney of the Sixth Judicial District may designate a part-time deputy prosecuting attorney to represent the office of the Prosecuting Attorney in Perry County.

(b) Perry County shall reimburse the deputy prosecuting attorney on a monthly basis for said representation in Perry County.

(c)(1) The prosecuting attorney may also choose to designate various deputy prosecuting attorneys on his staff to represent the office of the Prosecuting Attorney in Perry County.

(2) When this is done, Perry County shall reimburse the office of the Prosecuting Attorney of the Sixth Judicial District for said representation in Perry County.

(d) The Perry County Quorum Court shall appropriate not less than ten thousand nine hundred seven dollars (\$10,907) annually for said representation, as determined by the Quorum Court of Perry County.

History. Acts 1993, No. 997, § 3; 1995, No. 803, § 3; 1995, No. 1256, § 20; 1995 (1st Ex. Sess.), No. 13, § 4; 1997, No. 522, § 1.

Amendments. The 1995 amendment by No. 803 substituted “ten thousand nine hundred seven dollars (\$10,907)” for “ten thousand dollars (\$10,000)” in present (d).

The 1995 amendment by No. 1256, as

amended by Acts 1995 (1st Ex. Sess.), No. 13, § 4, repealed former (b); and added the present subsection designations.

The 1997 amendment made no changes to this section.

16-21-1104. Additional personnel or funds.

Nothing in this subchapter shall be construed to prohibit the Quorum Court of Pulaski County and the Quorum Court of Perry County from providing additional personnel or funds from whatever source available, whether federal, state, county, or municipal, if deemed necessary for the efficient operation of the office of the Prosecuting Attorney of the Sixth Judicial District.

History. Acts 1993, No. 997, § 4; 1995, No. 803, § 4; 1997, No. 522, § 1.

The 1997 amendment made no change in this section.

Amendments. The 1995 amendment made no change in this section.

16-21-1105. Supplemental funding.

(a) The state may provide for supplemental funding directly to the office of the Prosecuting Attorney of the Sixth Judicial District, including, but not limited to, funds collected under the provisions of §§ 5-64-505, 16-21-120, and 21-6-411.

(b) These funds shall be in addition to appropriated funds of the local quorum court, but subject to state audit.

History. Acts 1993, No. 997, § 5; 1995, No. 803, § 5; 1997, No. 522, § 1.

The 1997 amendment made no change in this section.

Amendments. The 1995 amendment added the subsection designations.

16-21-1106. Local appropriation for Pulaski County Division.

The Pulaski County Quorum Court shall appropriate not less than one hundred eighty-two thousand two hundred fifty dollars (\$182,250) in funds for the maintenance and operations account of the Pulaski County Division of the office of the Prosecuting Attorney of the Sixth Judicial District.

History. Acts 1993, No. 997, § 6; 1995, No. 803, § 6; 1997, No. 522, § 1.

Amendments. The 1995 amendment substituted “two hundred nineteen thousand two hundred dollars (\$219,200)” for “one hundred sixty-three thousand eight hundred eighty-nine dollars (\$163,889).”

The 1997 amendment substituted “one hundred eighty-two thousand two hundred fifty dollars (\$182,250)” for “two hundred nineteen thousand two hundred dollars (\$219,200).”

16-21-1107. Appointment of employees.

(a) The Prosecuting Attorney of the Sixth Judicial District shall have the power to appoint the following employees without confirmation of any court or tribunal, if the prosecutor receives a federal grant award therefor, at such salaries as are indicated in this subsection or as are authorized in grants awarded from the Drug Law Enforcement Program of the Office of Intergovernmental Services of the Department of Finance and Administration:

(1) Drug Unit Division Chief	\$43,372;
(2) Civil Litigation Attorney	\$36,608;
(3) Trial Attorney	\$38,071;
(4) Financial Investigator	\$32,972;
(5) Civil Litigation Investigator	\$25,056;
(6) Administrative Assistant	\$26,275; and
(7) Secretary	\$20,248.

(b) The Prosecuting Attorney of the Sixth Judicial District shall have the power to appoint deputy prosecuting attorneys to handle cases involving violence against women if the prosecutor receives a federal grant award therefor pursuant to the Violence Against Women Act, without confirmation of any court or tribunal, at such salaries as are authorized in the grant.

(c)(1) The positions created in subsection (a) of this section shall be in addition to those created by §§ 16-21-113 and 16-21-1102, and other Arkansas Code provisions.

(2) In the event additional funding becomes available, the prosecuting attorney may employ such additional employees and have expense allowances as are authorized in the grant awards of the Drug Law Enforcement Program of the Office of Intergovernmental Services of the Department of Finance and Administration.

(d) All law enforcement investigative positions shall have peace officer jurisdiction throughout the Sixth Judicial District and may serve process issuing out of all courts within the state.

(e)(1)(A) The Prosecuting Attorney of the Sixth Judicial District shall administer its Drug Law Enforcement Program grant from the Office of Intergovernmental Services of the Department of Finance and Administration.

(B) Expenditures may be made only for purposes of the grant.

(C) All moneys from the grant are appropriated on a continuing basis and are subject to the prosecuting attorney's financial management system, § 10-4-209.

(2) It is the explicit legislative intent that nothing in this section or §§ 16-21-1108 and 16-21-1109 shall be construed to decrease, supplant, or be substituted for employee positions, salaries, expenses, maintenance and operation expenses, or capital equipment expenditures which the office of the Prosecuting Attorney of the Sixth Judicial District will receive through quorum court appropriation from and after January 1, 1999.

History. Acts 1993, No. 997, § 7; 1995, No. 803, § 7; 1997, No. 522, § 1; 1999, No. 1234, § 2.

Amendments. The 1995 amendment rewrote the salaries in (a); inserted the subdivision designations in (b); rewrote (c); inserted the subdivision designations in (d)(1); and substituted "February 1, 1995" for "February 1, 1993" in (d)(2).

The 1997 amendment, in (a), inserted "federal" preceding "grant award," and rewrote grant award amounts; inserted sub-

section (b) and redesignated the remaining subsections accordingly; and substituted "January 1, 1997" for "February 1, 1995" in (e)(2).

The 1999 amendment rewrote (a); added "January 1, 1999" at the end of (e)(2); and made stylistic changes.

U.S. Code. The Violence Against Women Act, referred to in this section, is codified as a note under 42 U.S.C. § 13701.

16-21-1108. Federal funds.

The office of the Prosecuting Attorney of the Sixth Judicial District is authorized to receive funds from the federal government in the name of the office of the Prosecuting Attorney of the Sixth Judicial District and to receive both federal and state asset forfeiture funds and to utilize and expend those funds for such purposes as are allowed for by law or specified in § 5-64-505.

History. Acts 1993, No. 997, § 7; 1995, No. 803, § 8; 1997, No. 522, § 1.

Amendments. The 1995 amendment made no change in this section.

The 1997 amendment inserted "office of" preceding "prosecuting attorney."

16-21-1109. Hot check funds.

The office of the Prosecuting Attorney of the Sixth Judicial District is hereby authorized to establish a hot check program pursuant to state statute to collect fees for the hot check fund as authorized by the General Assembly and to expend those funds in official uses for the benefit of the office.

History. Acts 1993, No. 997, § 7; 1995, No. 803, § 9; 1997, No. 522, § 1.

Amendments. The 1995 amendment made no change in this section.

The 1997 amendment made no change in this section.

SUBCHAPTER 12 — SEVENTH JUDICIAL DISTRICT

SECTION.

16-21-1201. Contingent expense allowance.

SECTION.

16-21-1202. Operating expenses — Staff.

A.C.R.C. Notes. Acts 1989 (3rd Ex. Sess.), No. 97, § 1, provided: "In addition to the deputy prosecutor positions created by Arkansas Code Annotated § 16-21-113 and other Arkansas Code provisions, the prosecuting attorney of the Seventh Judicial District shall have the power to ap-

point deputy prosecuting attorneys, investigators, case coordinators or employees at such salaries as are authorized in the grant awards from the Department of Finance and Administration, Intergovernmental Services, Drug Law Enforcement Program, Anti-Drug Abuse Act of 1986.

The investigators and case coordinators shall have jurisdiction throughout the judicial district served, and have the power granted to peace officers by the statutes of this State and may serve process issuing out of all courts within the judicial district."

Publisher's Notes. Acts 1989 (3rd Ex. Sess.), No. 97, § 2, provided: "Nothing in this Act shall be construed to prohibit the quorum courts or city governing bodies of the Seventh Judicial District from providing additional personnel or funds, from whatever sources available, to the prosecuting attorney's office for the Anti-Drug Abuse program."

Effective Dates. Acts 1975, No. 188, §§ 4, 6: retroactive to Jan. 1, 1975. Emergency clause provided: "It is hereby found and determined by the General Assembly that it is essential to the effective and efficient administration of justice in the Seventh Judicial District in the State of Arkansas that the compensation of deputy prosecuting attorneys in said district be specifically prescribed by law, and that the contingent expense allowance of the prosecuting attorney in said district be prescribed and allocated to the various counties in the district; that this Act is immediately necessary to accomplish this purpose and should be given effect immediately. Therefore, an emergency is hereby declared to exist and this act being necessary for the immediate preservation of the public peace, health and safety shall be in full force and effect from and after its passage and approval."

Acts 1977, No. 496, §§ 2, 3: retroactive to Jan. 1, 1977. Emergency clause provided: "It is hereby found and determined by the General Assembly that it is essential to the effective and efficient administration of justice in the Seventh Judicial District in the State of Arkansas that the contingent expense allowance of the prosecuting attorney in said district be increased and that the increase be given

effect at the earliest possible date. Therefore, an emergency is hereby declared to exist and this Act being necessary for the immediate preservation of the public peace, health, and safety, shall be in full force and effect from and after its passage and approval."

Acts 1979, No. 458, § 5: Mar. 21, 1979. Emergency clause provided: "It is hereby found and determined by the Seventy-Second General Assembly that the salaries of the support personnel and the expense allowance for the prosecutor of the Seventh Judicial Circuit are inadequate and that this Act is immediately necessary to provide for the efficient administration of justice in said circuit. Therefore, an emergency is hereby declared to exist and this Act being immediately necessary for the preservation of the public peace, health and safety shall be in full force and effect from and after its passage and approval."

Acts 1997, No. 1180, § 5: Apr. 8, 1997. Emergency clause provided: "It is found and determined by the General Assembly of the State of Arkansas that this act is essential to the operation of the criminal justice system within the Seventh Judicial District. It is also determined that the prosecuting attorney of the Seventh Judicial District is in need of these personnel in order to fight the war on drugs and combat crime in the Seventh Judicial District. Therefore an emergency is declared to exist and this act being immediately necessary for the preservation of the public peace, health and safety shall become effective on the date of its approval by the Governor. If the bill is neither approved nor vetoed by the Governor, it shall become effective on the expiration of the period of time during which the Governor may veto the bill. If the bill is vetoed by the Governor and the veto is overridden, it shall become effective on the date the last house overrides the veto."

16-21-1201. Contingent expense allowance.

(a) The Prosecuting Attorney of the Seventh Judicial District shall be entitled to a contingent expense allowance of not less than eleven thousand sixty-three dollars (\$11,063) per annum to be paid by the respective counties of the Seventh Judicial District as follows:

- (1) Saline County \$7,463;
- (2) Hot Spring County \$2,400; and
- (3) Grant County \$1,200.
- (b) Saline County may at any time increase its contribution to such contingent expense allowance.

History. Acts 1975, No. 188, § 3; 1977, No. 496, § 1; 1979, No. 458, § 1; 1981, No. 986, § 1; A.S.A. 1947, § 24-114.9.

CASE NOTES

Cited: Villines v. Tucker, 324 Ark. 13, 918 S.W.2d 153 (1996).

16-21-1202. Operating expenses — Staff.

(a) The office of the Prosecuting Attorney of the Seventh Judicial District shall receive not less than a contingent expense reimbursement for the expenses of the office including, but not limited to, maintenance and operation, capital outlay, office supplies, telephone, postage, copying, insurance, and library in the following amounts to be borne by the respective counties of the of the Seventh Judicial District:

- (1) Saline County \$47,359;
- (2) Grant County \$14,800; and
- (3) Hot Spring County \$5,000.

(b) The counties shall pay the authorized annual amounts in equal quarterly installments from the county general fund of the respective counties and the checks shall be made payable to the office of the prosecuting attorney. Disbursements shall be made by the prosecuting attorney for the necessary expenses of the office based upon adequate documentation.

(c) The prosecuting attorney or deputies may also be allowed additional expenses upon appropriation of the quorum court and approval of the county judge.

(d) The Prosecuting Attorney of the Seventh Judicial District shall be entitled to the following assistants and employees:

(1) One (1) chief deputy prosecuting attorney for Saline County, whose salary shall not be less than forty-six thousand two hundred dollars (\$46,200) per annum. The salary is to be paid in accordance with the pay periods and payroll policy for county employees of Saline County. In addition to the salary, social security, matching retirement, insurance, and all related salary expenses shall be paid by Saline County;

(2) Two (2) deputy prosecuting attorneys for Saline County, whose salary shall not be less than forty thousand seven hundred ninety-six dollars (\$40,796) per annum. The salary is to be paid in accordance with the pay periods and payroll policy for county employees of Saline County. In addition to the salary, social security, matching retirement,

insurance, and all related salary expenses shall be paid by Saline County;

(3) One (1) deputy prosecuting attorney for Saline County, whose salary shall not be less than thirty-five thousand dollars (\$35,000) per annum. The salary is to be paid in accordance with the pay periods and payroll policy for county employees of Saline County. In addition to the salary, social security, matching retirement, insurance, and all related salary expenses shall be paid by Saline County;

(4) One (1) deputy prosecuting attorney for Saline County, whose salary shall not be less than ten thousand dollars (\$10,000) per annum. The salary is to be paid in accordance with the pay periods and payroll policy for county employees of Saline County. In addition to the salary, social security, matching retirement, insurance, and all related salary expenses may be paid by Saline County. This deputy prosecuting attorney shall be allowed to engage in private practice;

(5) One (1) deputy prosecuting attorney for child support cases for Saline County, whose salary shall not be less than eighteen thousand five hundred sixty-eight dollars (\$18,568) per annum. The salary is to be paid in accordance with the pay periods and payroll policy for county employees of Saline County. In addition to the salary, social security, matching retirement, insurance, and all related salary expenses may be paid by Saline County. This deputy prosecuting attorney shall be allowed to engage in private practice;

(6) One (1) victim/witness director for Saline County, whose salary shall not be less than twenty-four thousand five hundred forty-eight dollars (\$24,548) per annum. The salary is to be paid in accordance with the pay periods and payroll policy of Saline County. In addition to the salary, social security, matching retirement, insurance, and all related salary expenses shall be paid by Saline County;

(7) One (1) victim/witness coordinator for Saline County, whose salary shall not be less than twenty thousand three hundred eleven dollars (\$20,311) per annum. The salary is to be paid in accordance with the pay periods and payroll policy of Saline County. In addition to the salary, social security, matching retirement, insurance, and all related salary expenses shall be paid by Saline County;

(8) One (1) office manager for Saline County, whose salary shall not be less than eighteen thousand three hundred seventy dollars (\$18,370) per annum. The salary is to be paid in accordance with the pay periods and payroll policy of Saline County. In addition to the salary, social security, matching retirement, insurance, and all related salary expenses shall be paid by Saline County;

(9) One (1) hot check coordinator for Saline County, whose salary shall not be less than eighteen thousand nine hundred sixty-one dollars (\$18,961) per annum. The salary is to be paid in accordance with the pay periods and payroll policy of Saline County. In addition to the salary, social security, matching retirement, insurance, and all related salary expenses shall be paid by Saline County;

(10) Two (2) secretaries for Saline County, whose salaries shall not be less than fourteen thousand seven hundred dollars (\$14,700) per

annum. The salary is to be paid in accordance with the pay periods and payroll policy of Saline County. In addition to the salary, social security, matching retirement, insurance, and all related salary expenses shall be paid by Saline County;

(11) One (1) deputy prosecuting attorney for Hot Spring County, whose salary shall not be less than fourteen thousand seven hundred ninety dollars (\$14,790) per annum. The salary is to be paid in accordance with the pay periods and payroll policy for county employees of Hot Spring County. In addition to the salary, social security, matching retirement, insurance, and all related salary expenses may be paid by Hot Spring County. This deputy prosecuting attorney shall be allowed to engage in private practice;

(12) One (1) deputy prosecuting attorney for child support cases for Hot Spring County, whose salary shall not be less than sixteen thousand six hundred twenty-seven dollars (\$16,627) per annum. The salary is to be paid in accordance with the pay periods and payroll policy for county employees of Hot Spring County. In addition to the salary, social security, matching retirement, insurance, and all related salary expenses may be paid by Hot Spring County. This deputy prosecuting attorney shall be allowed to engage in private practice;

(13) One (1) deputy prosecuting attorney for Hot Spring County, whose salary shall not be less than eighteen thousand three hundred ninety-six (\$18,396) per annum. The salary is to be paid in accordance with the pay periods and payroll policy for county employees of Hot Spring County. In addition to the salary, social security, matching retirement, insurance, and all related salary expenses may be paid by Hot Spring County;

(14) One (1) legal secretary/hot check coordinator/victim-witness director for Hot Spring County, whose salary shall not be less than nineteen thousand two hundred fifty eight dollars (\$19,258) per annum. The salary is to be paid in accordance with the pay periods and payroll policy of Hot Spring County. In addition to the salary, social security, matching retirement, insurance, and all related salary expenses shall be paid by Hot Spring County;

(15) One (1) deputy prosecuting attorney for Grant County, whose salary shall not be less than nineteen thousand seven hundred two dollars (\$19,702) per annum. The salary is to be paid in accordance with the pay periods and payroll policy for county employees of Grant County. In addition to the salary, social security, matching retirement, insurance, and all related salary expenses may be paid by Grant County. This deputy prosecuting attorney shall be allowed to engage in private practice;

(16) One (1) deputy prosecuting attorney for Grant County, whose salary shall not be less than sixteen thousand five hundred dollars (\$16,500) per annum. The salary is to be paid in accordance with the pay periods and payroll policy for county employees of Grant County. In addition to the salary, social security, matching retirement, insurance, and all related salary expenses may be paid by Grant County. This

deputy prosecuting attorney shall be allowed to engage in private practice;

(17) One (1) deputy prosecuting attorney for child support cases for Grant County, whose salary shall not be less than ten thousand dollars (\$10,000) per annum. The salary is to be paid in accordance with the pay periods and payroll policy for county employees of Grant County. In addition to the salary, social security, matching retirement, insurance, and all related salary expenses may be paid by Grant County. This deputy prosecuting attorney shall be allowed to engage in private practice;

(18) One (1) legal secretary for Grant County, whose salary shall not be less than seventeen thousand six hundred forty dollars (\$17,640) per annum. The salary is to be paid in accordance with the pay periods and payroll policy of Grant County. In addition to the salary, social security, matching retirement, insurance, and all related salary expenses shall be paid by Grant County; and

(19) The prosecuting attorney of the Seventh Judicial District shall be allowed additional assistance and employees in each county upon appropriation of the quorum court and approval of the county judge in each respective county.

History. Acts 1997, No. 1180, § 1.

SUBCHAPTER 13 — EIGHTH JUDICIAL DISTRICT

SECTION.

16-21-1301. Contingent expense allowances.

A.C.R.C. Notes. Acts 1989, No. 585, § 1, provided: "In addition to the deputy prosecutor positions created by § 16-21-113 and other Arkansas Code provisions, the prosecuting attorneys of the Eighth, Ninth-West, Tenth, Thirteenth, Sixteenth and Twentieth Judicial Districts shall have the power to appoint deputy prosecuting attorneys, investigators, or employees at such salaries as are authorized in the grant awards from the Department of Finance and Administration, Intergovernmental Services, Drug Law Enforcement Program, Anti-Drug Abuse Act of 1986. Said investigators and case coordinators shall have jurisdiction throughout the judicial district served, and have the power granted to peace officers by the statutes of this State and may serve process issuing out of all courts within the judicial district."

Publisher's Notes. Acts 1988 (4th Ex. Sess.), No. 10, §§ 1, 2, and No. 20, §§ 1, 2, provide that, in addition to the deputy

prosecutor positions created by § 16-21-113 and other statutory provisions, the Prosecuting Attorney of the Eighth Judicial District shall have the power to appoint deputy prosecuting attorneys, investigators, or employees at such salaries as are authorized in the grant awards from the Department of Finance and Administration, Intergovernmental Services, Drug Law Enforcement Program, Anti-Drug Abuse Act of 1986; that the investigators and case coordinators shall have jurisdiction throughout the judicial district served, have the power granted to peace officers by the statutes of this state, and may serve process issuing out of all courts within the judicial district; and that nothing in these acts shall be construed to prohibit the quorum courts or city governing bodies of the various judicial districts from providing additional personnel or funds, from whatever sources available, to the prosecuting attorneys' offices for the Anti-Drug Abuse program.

Effective Dates. Acts 1963, No. 64, §§ 3, 4: retroactive to Jan. 1, 1963. Emergency clause provided: "It has been ascertained and determined by the General Assembly of the State of Arkansas that the contingent expense allowance of the prosecuting attorney of the Eighth Judicial Circuit is inadequate to reimburse said prosecuting attorney for expenses incurred in the performance of his duties, and that the efficient operation of the courts and the administration of justice in the Eighth Judicial Circuit has been jeopardized thereby. Therefore, an emergency is hereby declared to exist and this act being necessary for the immediate preservation of the public peace, health and safety, shall be in full force and effect from and after its passage and approval."

Acts 1979, No. 767, §§ 3, 5: retroactive to Jan. 1, 1979. Emergency clause provided: "It is hereby found and determined by the General Assembly of the State of Arkansas that the contingent expense allowances of the prosecuting attorneys of the Eighth and Ninth Judicial Districts are insufficient to reimburse the prosecu-

tors for expenses incurred in connection with their offices and that this Act is immediately necessary to increase such expense allowances. Therefore, an emergency is hereby declared to exist and this Act being immediately necessary for the preservation of the public peace, health and safety shall be in full force and effect from and after its passage and approval."

Acts 1981, No. 954, § 3: became law without Governor's signature, Apr. 8, 1981. Emergency clause provided: "It is hereby found and determined by the General Assembly that the contingent expense allowance of the prosecuting attorney of the Eighth Circuit-Chancery Court Circuit is inadequate to enable said prosecuting attorney to effectively and efficiently carry out his responsibilities; that this Act is designed to correct this situation and should be given effect immediately. Therefore, an emergency is hereby declared to exist and this Act being necessary for the immediate preservation of the public peace, health and safety shall be in full force and effect from and after its passage and approval."

16-21-1301. Contingent expense allowances.

(a)(1) In lieu of any other contingent expense allowance now provided by law for the Prosecuting Attorney of the Eighth Judicial District-North and the Prosecuting Attorney of the Eighth Judicial District-South, the office of the Prosecuting Attorney of the Eighth Judicial District-North and the office of the Prosecuting Attorney of the Eighth Judicial District-South shall receive contingent expense reimbursement funds as provided in this section.

(2) The contingent expense reimbursement funds authorized by this section shall be used solely for the purpose of reimbursing the costs of operating the office of the Prosecuting Attorney of the Eighth Judicial District-North and the office of the Prosecuting Attorney of the Eighth Judicial District-South.

(3) Reimbursements shall be based on itemized documentation, which shall be retained for audit purposes.

(b)(1)(A) The respective counties within the Eighth Judicial District-North shall contribute annually to the contingent expense fund such amount as shall be approved by the quorum courts of the respective counties within the prescribed minimum and maximum amounts set forth below:

Nevada County	Minimum \$1,500
	Maximum 7,500
Hempstead County	Minimum 2,000
	Maximum 7,500

(B) The respective counties within the Eighth Judicial District-South shall contribute annually to the contingent expense fund such amount as shall be approved by the quorum courts of the respective counties within the prescribed minimum and maximum amounts set forth below:

Lafayette County	Minimum	\$2,000
	Maximum	7,500
Miller County	Minimum	2,700
	Maximum	7,500

(2) The counties in the Eighth Judicial District-North and the Eighth Judicial District-South shall pay the approved allowance in equal monthly installments.

History. Acts 1963, No. 64, § 1; 1979, No. 767, § 1; 1981, No. 954, § 1; A.S.A. 1947, § 24-114.2; Acts 1997, No. 1167, § 1; 1999, No. 1274, § 1.
Amendments. The 1997 amendment rewrote (a).
The 1999 amendment inserted “-North

and the Prosecuting Attorney of the Eighth Judicial District-South” following “Eighth Judicial District” throughout (a); in (b)(1)(A), inserted “-North” following “District”, substituted “7,500” for “3,500” and “7,500” for “5,000”; rewrote (b)(1)(B) and (b)(2); and made stylistic changes.

CASE NOTES

Cited: Villines v. Tucker, 324 Ark. 13, 918 S.W.2d 153 (1996).

SUBCHAPTER 14 — NINTH JUDICIAL DISTRICT

SECTION.
16-21-1401. Election.
16-21-1402. Expense allowances.

A.C.R.C. Notes. Acts 1989, No. 585, § 1, provided: “In addition to the deputy prosecutor positions created by § 16-21-113 and other Arkansas Code provisions, the prosecuting attorneys of the Eighth, Ninth-West, Tenth, Thirteenth, Sixteenth and Twentieth Judicial Districts shall have the power to appoint deputy prosecuting attorneys, investigators, or employees at such salaries as are authorized in the grant awards from the Department

of Finance and Administration, Intergovernmental Services, Drug Law Enforcement Program, Anti-Drug Abuse Act of 1986. Said investigators and case coordinators shall have jurisdiction throughout the judicial district served, and have the power granted to peace officers by the statutes of this State and may serve process issuing out of all courts within the judicial district.”

16-21-1401. Election.

(a) The qualified electors of Clark County and Pike County shall elect a prosecuting attorney to serve only the Ninth Judicial District-East.

(b) The qualified electors of Howard County, Little River County, and Sevier County shall elect a prosecuting attorney to serve only the Ninth Judicial District-West.

History. Acts 1977, No. 432, § 1; 1979, No. 834, § 1; A.S.A. 1947, § 22-365.

CASE NOTES

Cited: *Beaumont v. Adkisson*, 267 Ark. 511, 593 S.W.2d 11 (1980).

16-21-1402. Expense allowances.

(a) The Prosecuting Attorney of the Ninth Judicial District-East shall receive a contingent expense allowance of two thousand four hundred dollars (\$2,400) per annum to be paid one thousand six hundred dollars (\$1,600) by Clark County and eight hundred dollars (\$800) by Pike County.

(b) The Prosecuting Attorney of the Ninth Judicial District-West shall receive an expense allowance from each county in the district of no less than one hundred fifty dollars (\$150) per month per county and no greater than seven hundred dollars (\$700) per month per county payable in equal monthly installments.

History. Acts 1979, No. 834, § 4; A.S.A. 1947, § 24-114.15; Acts 1987, No. 656, § 1.

SUBCHAPTER 15 — TENTH JUDICIAL DISTRICT

SECTION.

16-21-1501. Applicability.

16-21-1502. Contingent expense allowances.

SECTION.

16-21-1503. Assessment and collection of prosecuting attorney's fees.

A.C.R.C. Notes. Acts 1989, No. 585, § 1, provided: "In addition to the deputy prosecutor positions created by § 16-21-113 and other Arkansas Code provisions, the prosecuting attorneys of the Eighth, Ninth-West, Tenth, Thirteenth, Sixteenth and Twentieth Judicial Districts shall have the power to appoint deputy prosecuting attorneys, investigators, or employees at such salaries as are authorized in the grant awards from the Department of Finance and Administration, Intergovernmental Services, Drug Law Enforcement Program, Anti-Drug Abuse Act of 1986. Said investigators and case coordinators shall have jurisdiction throughout the judicial district served, and have the

power granted to peace officers by the statutes of this State and may serve process issuing out of all courts within the judicial district."

Publisher's Notes. Acts 1988 (4th Ex. Sess.), No. 10, §§ 1, 2, and No. 20, §§ 1, 2, provide that, in addition to the deputy prosecutor positions created by § 16-21-113 and other statutory provisions, the Prosecuting Attorney of the Tenth Judicial District shall have the power to appoint deputy prosecuting attorneys, investigators, or employees at such salaries as are authorized in the grant awards from the Department of Finance and Administration, Intergovernmental Services, Drug Law Enforcement Program, Anti-Drug

Abuse Act of 1986; that the investigators and case coordinators shall have jurisdiction throughout the judicial district served, have the power granted to peace officers by the statutes of this state, and may serve process issuing out of all courts within the judicial district; and that nothing in these acts shall be construed to prohibit the quorum courts or city governing bodies of the various judicial districts from providing additional personnel or funds, from whatever sources available, to the prosecuting attorneys' offices for the Anti-Drug Abuse program.

Effective Dates. Acts 1995 (1st Ex. Sess.), No. 13, § 13: Oct. 23, 1995. Emergency clause provided: "It is hereby found and determined by the General Assembly

of the State of Arkansas that the current system of funding the state judicial system has created inequity in the level of judicial services available to the citizens of the state; and it is further determined that the current method of financing the state judicial system has become so complex as to make the administration of the system impossible, and the lack of reliable data on the current costs of the state judicial system prohibits any comprehensive change in the funding of the system at this time. Therefore, an emergency is hereby declared to exist and this act being necessary for the immediate preservation of the public peace, health, and safety, shall be in full force and effect from and after its passage and approval."

16-21-1501. Applicability.

This subchapter shall apply to the Tenth Judicial District, which is composed of Ashley County, Bradley County, Chicot County, Desha County, and Drew County.

History. Acts 1985, No. 1097, § 1; A.S.A. 1947, § 24-114.19.

16-21-1502. Contingent expense allowances.

In lieu of any other contingent expense allowance provided by law for the office of the Prosecuting Attorney of the Tenth Judicial District, the prosecuting attorney shall be authorized an expense allowance of not less than twenty-seven thousand dollars (\$27,000) per year nor more than forty-seven thousand dollars (\$47,000) per year, as shall be determined by the quorum courts, to be borne by the respective counties of the Tenth Judicial District as follows:

COUNTY	MAXIMUM	MINIMUM	PERCENTAGE
Ashley	\$13,630	\$7,830	29%
Bradley	4,700	2,700	10%
Chicot	10,810	6,210	23%
Desha	10,810	6,210	23%
Drew	7,050	4,050	15%

History. Acts 1985, No. 1097, § 4; A.S.A. 1947, § 24-114.17.

16-21-1503. Assessment and collection of prosecuting attorney's fees.

(a) At the end of each calendar month and within ten (10) days thereafter, the officers collecting the fees shall pay them into the treasury of the county, except as otherwise provided in Acts 1985, No. 1097, §§ 2 and 3, and shall receive from the treasurer his receipt in duplicate, a copy of which shall be filed with the county clerk, and the other copy kept by the office or person making the settlement with the treasury.

(b) It is further recognized that for the most important and complicated work performed by the prosecuting attorney of the counties affected by this subchapter, fees are not provided by law. Therefore, it specifically is the legislative intent to provide the salaries and office expenses set forth in this subchapter without regard to the amount of prosecuting attorney's fees and emoluments earned or collected in the judicial district affected by this subchapter.

History. Acts 1985, No. 1097, § 5; A.S.A. 1947, § 24-114.18; Acts 1993, No. 395, § 1; 1995, No. 1256, § 20; 1995 (1st Ex. Sess.), No. 13, § 4.

Publisher's Notes. Acts 1985, No. 1097, §§ 2 and 3, referred to in this section, were special legislation applying to deputy prosecuting attorneys of the Tenth Judicial District.

Amendments. The 1993 amendment,

in (a), deleted "except traffic offenses regarded as violations as defined and punished under the Arkansas Criminal Code" following "collect in all cases," and substituted "§§ 21-6-410 and 15-42-121" for "§§ 12-1707 and 47-519."

The 1995 amendment by No. 1256, as amended by Acts 1995 (1st Ex. Sess.), No. 13, § 4, repealed former (a), redesignating former (b) and (c) as present (a) and (b).

SUBCHAPTER 16 — ELEVENTH JUDICIAL DISTRICT

SECTION.

16-21-1601. Election.

16-21-1602. Contingent expense allowance.

16-21-1603. Reimbursement of expenses

to Prosecuting Attorney of Eleventh Judicial District-East.

Publisher's Notes. Acts 1981, No. 609, § 4, provided that the division of the Eleventh District into East and West districts was effective January 1, 1983.

Effective Dates. Acts 1979, No. 459, §§ 4, 7: retroactive to Jan. 1, 1979. Emergency clause provided: "It is hereby found and determined by the General Assembly that the expense allowance presently provided for the prosecuting attorney of the Eleventh Judicial District and the compensation and allowances for deputy prosecuting attorneys in said district are inadequate to compensate the prosecuting attorney and his deputies for their services; that this Act is designed to provide

adequate compensation and allowances for said officers and to thereby promote the effective and efficient administration of justice in the Eleventh Judicial District, and should be given effect immediately. Therefore, an emergency is hereby declared to exist and this Act being necessary for the immediate preservation of the public peace, health and safety shall be in full force and effect from and after its passage and approval."

Acts 1983, No. 3, § 3: became law without Governor's signature, Jan. 25, 1983. Emergency clause provided: "It is hereby found and determined by the General Assembly of the State of Arkansas that the

prosecuting attorney of the Eleventh East Judicial Circuit must be provided adequate secretarial hire, part-time deputy hire, and reimbursement for other reasonable and necessary expenses for the operation of said office; that the providing of adequate allowances for the efficient operation of the prosecuting attorney's office of the Eleventh East Judicial Circuit is essential to the administration of justice in said judicial circuit; and that the immediate passage of this Act is necessary to provide said allowances in order to promote the administration of justice in said judicial circuit. Therefore, an emergency is hereby declared to exist and this Act, being necessary for the preservation of the public peace, health and safety shall be in full force and effect from and after its passage and approval."

Acts 1983, No. 922, § 18: July 1, 1983. Emergency clause provided: "It is hereby found and determined by the Seventy-Fourth General Assembly that the Constitution of the State of Arkansas prohibits the appropriation of funds for more than a two (2) year period; that the effectiveness of the Act on July 1, 1983 is essential to the operation of the agency for which the appropriations in this Act are provided, and that in the event of an extension of the Regular Session, the delay in the effective date of this Act beyond July 1, 1983 could work irreparable harm upon the proper administration and provision of essential governmental programs; and

that the immediate effectiveness of Section 3 of this Act is essential to maintaining the fiscal integrity of the Judges Retirement Fund which would otherwise work irreparable harm upon the provision of essential governmental programs. Therefore, an emergency is hereby declared to exist and this Act being necessary for the immediate preservation of the public peace, health and safety shall be in full force and effect as follows: Section 3 of this Act shall be effective immediately upon passage and approval of this Act; and all other sections and provisions of this Act shall be effective from and after July 1, 1983."

Acts 1989, No. 7, § 9: Feb. 1, 1989. Emergency clause provided: "It is hereby found and determined by the General Assembly that the duties incumbent upon the Case Coordinators of the Circuit and Chancery Courts of the Eleventh Judicial District-West of Arkansas have materially increased because of increases in population, caseload and the trial dockets of said Circuit and Chancery District, and that there has been a substantial increase in the costs of living, necessitating an increase in salaries in order to properly cope with the prevailing conditions and prevent hardship. Therefore, an emergency is hereby declared to exist and this Act being necessary for the preservation of the public peace, health and safety shall be in full force and effect from and after its passage and approval."

16-21-1601. Election.

(a) The qualified electors of the Eleventh Judicial District-East shall elect one (1) prosecuting attorney.

(b) The qualified electors of the Eleventh Judicial District-West shall elect one (1) prosecuting attorney.

History. Acts 1977, No. 432, § 1; 1981, No. 609, § 1; 1983, No. 922, § 15; A.S.A. 1947, § 22-365.

Publisher's Notes. Acts 1981, No. 609, § 3, provided that, unless otherwise provided by law, the prosecuting attorney of the Eleventh District-West should continue to receive the salary and allowances

provided by law for the office of prosecuting attorney for the Eleventh District, and for the purpose of determining the compensation and allowances of the prosecuting attorney of the Eleventh District-East, the Eleventh District-East should be classified a Division B Judicial District.

CASE NOTES

Cited: *Beaumont v. Adkisson*, 267 Ark. 511, 593 S.W.2d 11 (1980).

16-21-1602. Contingent expense allowance.

(a) In lieu of any other contingent expense allowance provided by law for the prosecuting attorney of the Eleventh Judicial District, the prosecuting attorney shall be authorized a contingent expense allowance of twenty thousand dollars (\$20,000) per year, to be borne by the respective counties of the Eleventh Judicial District, as follows:

Jefferson County	\$17,000
Arkansas County	2,000
Lincoln County	1,000

(b) The counties in the Eleventh Judicial District shall pay the above-prescribed annual amounts in equal monthly installments.

History. Acts 1979, No. 459, § 1; A.S.A. 1947, § 24-114.10. penses prescribed in the act should be subject to the approval of the quorum courts of the respective counties.

Publisher's Notes. Acts 1979, No. 459, § 3, provided that the salaries and ex-

CASE NOTES

Cited: *Villines v. Tucker*, 324 Ark. 13, 918 S.W.2d 153 (1996).

16-21-1603. Reimbursement of expenses to Prosecuting Attorney of Eleventh Judicial District-East.

(a) The Quorum Court of Arkansas County shall furnish the Prosecuting Attorney of the Eleventh Judicial District-East reasonable reimbursement for secretarial hire, part-time deputy hire, social security and unemployment matching expenses, and for office supplies, in-state travel, telephone and other utilities, and office equipment rental and upkeep, as may be necessary for the operation of the office, in an amount not less than twenty-five thousand nine hundred sixty-one dollars (\$25,961) per annum, or such additional amount as may be provided by the quorum court of the county.

(b) The prosecuting attorney shall file claims monthly for reimbursement of authorized items of expense incurred during the previous month, but in no event shall the amount of the reimbursement during any month be greater than one-twelfth ($\frac{1}{12}$) of the amount authorized in this section or such additional annual amount as may be approved by the quorum court.

History. Acts 1983, No. 3, § 1; A.S.A. 1947, § 24-114.10a.

CASE NOTES

Cited: Villines v. Tucker, 324 Ark. 13, 918 S.W.2d 153 (1996).

SUBCHAPTER 17 — TWELFTH JUDICIAL DISTRICT

SECTION.

16-21-1701. Contingent expense allowance.

16-21-1702. Appointment of deputies and employees.

SECTION.

16-21-1703. Prosecutor and deputies — Power and authority.

16-21-1704. Appropriations by quorum courts.

A.C.R.C. Notes. Acts 1993, No. 312, § 3, provided, in part, that: "(d) The Prosecuting Attorney shall have the power to appoint Deputy Prosecuting Attorneys and other employees at such salaries as are authorized in the grant awards from the Department of Finance and Administration Drug Law Enforcement Program, Anti-Drug Abuse Act of 1986.

"(e) The Prosecuting Attorney acting through the Twelfth Judicial Circuit Drug Task Force shall have the authority to expend funds from the Department of Finance and Administration Drug Law Enforcement Program, Anti-Drug Abuse Act of 1986. Those funds that are designated "overtime funds" are authorized under the grant to be paid to law enforcement officers who are certified with various police agencies in the State of Arkansas. Law enforcement personnel who are employed by police agencies or sheriffs' offices, including the State Police, may receive these funds without being considered employees of the Prosecuting Attorney's Office. In addition, overtime funds paid these officers under this Drug Task Force Grant procedure are not to be construed as violating any legislative salary cap accorded these officers in the normal course of employment with their various agencies. These funds are intended to supplement funds provided to these departments as salaries to enhance the drug-fighting capabilities of the Twelfth Judicial Circuit Task Force and to a larger extent, the State of Arkansas, and will be paid with the knowledge of the cooperating agencies involved.

"(f) The Prosecuting Attorney's Office of the Twelfth Judicial Circuit is authorized to receive funds from the federal govern-

ment in the name of the Twelfth Judicial Circuit Task Force both from federal grants and from asset forfeiture funds, and utilize those for official purposes as described in the above paragraph (e)."

Effective Dates. Acts 1985, No. 500, § 8: became law without Governor's signature, Mar. 25, 1985. Emergency clause provided: "It is hereby found and determined by the General Assembly that this Act is essential to the operation of criminal justice within the Twelfth Judicial Circuit. Therefore, an emergency is hereby declared to exist and this Act, being necessary for the immediate preservation of the public peace, health and safety shall be in full force and effect from and after its passage and approval."

Acts 1991, No. 237, § 9: Feb. 26, 1991. Emergency clause provided: "It is hereby found and determined by the General Assembly that this act is essential to the operation of criminal justice within the Twelfth (12th) Judicial Circuit. It is also hereby found and determined by the General Assembly that the Prosecuting Attorney of the Twelfth (12th) Judicial Circuit is in need of additional personnel in order to fight the war on drugs; that this act authorizes such additional personnel and expenditures, and that said personnel are cooperating with law enforcement agencies in manners such as to incur threats to their personal safety and the safety of persons they are working with, and that protective measures need to be taken in order to encourage the Prosecutor's Office to undertake such actions which result in greater cooperation between law enforcement agencies within the District and more effective and efficient law enforcement in all areas and particularly the war

on drugs. Therefore, an emergency is hereby declared to exist and this act, being necessary for the immediate preservation of the public peace, health and safety shall be in full force and effect from and after its passage and approval."

Acts 1993, No. 312, § 8: Noted: Mar. 2, 1993. Emergency clause provided: "It is hereby found and determined by the General Assembly that this act is essential to the operation of criminal justice within the Twelfth (12th) Judicial Circuit. It is also hereby found and determined by the General Assembly that the Prosecuting Attorney of the Twelfth (12th) Judicial Circuit is in need of additional personnel in order to fight the war on drugs, and that this act authorizes such additional personnel and expenditures, and that said personnel are cooperating with law enforcement agencies in manners such as to incur threats to their personal safety and the safety of persons they are working with, and that protective measures need to be taken in order to encourage the Prosecutor's Office to undertake such actions which result in greater cooperation between law enforcement agencies within the District and more effective and efficient law enforcement in all areas and particularly the war on drugs. The Legislature recognizes that tax funds normally available for law enforcement agencies to increase manpower are unavailable and that the Federal Grant Program and Asset Forfeiture Programs are an excellent means of providing additional law enforcement help to combat drugs without depleting the treasuries of the state. The Legislature specifically intends that these funds are to be utilized to enhance manpower available by allowing the Prosecutor's Office to pay overtime to these officers as an incentive to increase anti-drug effectiveness of these agencies. The question of whether or not this may exceed normal salary caps is specifically addressed in the statute to provide that the salary caps shall not apply in the case of overtime funds expended under the provisions of this act. Therefore, an emergency is hereby declared to exist and this act, being necessary for the immediate preservation of the public peace, health and safety shall be in full force and effect from and after its passage and approval."

Acts 1995, No. 1148, § 8: Apr. 6, 1995. Emergency clause provided: "It is hereby

found and determined by the General Assembly that this act is essential to the operation of criminal justice within the Twelfth (12th) Judicial Circuit. It is also hereby found and determined by the General Assembly that the Prosecuting Attorney of the Twelfth (12th) Judicial Circuit is in need of additional personnel in order to fight the war on drugs and combat violent crime, that this act authorizes such additional personnel and expenditures, and that said personnel are cooperating with law enforcement agencies in manners such as to incur threats to their personal safety and the safety of persons they are working with, and that protective measures need to be taken in order to encourage the Prosecutor's Office to undertake such actions which result in greater cooperation between law enforcement agencies within the District and more effective and efficient law enforcement in all areas and particularly the war on drugs and violent and juvenile crime. The Legislature recognizes that tax funds normally available for law enforcement agencies to increase manpower are unavailable and that the Federal Grant Program and Asset Forfeiture Programs are an excellent means of providing additional law enforcement help to combat drugs and violent crimes without depleting the treasuries of the state. The Legislature specifically intends that these funds are to be utilized to enhance manpower available by allowing the prosecutor's Office to pay overtime to these officers as an incentive to increase anti-drug and anti-crime effectiveness of these agencies. The question of whether or not this may exceed normal salary caps is specifically addressed in the code to provide that salary caps shall not apply in the case of overtime funds expended under the provisions of this act. Also, in the event that the Twelfth Circuit is subject to a division, an orderly transition must be set in place to ensure that the public is protected and to further guarantee that the division will not interfere with the effective and efficient operation of the Prosecuting Attorney's Office of the Twelfth Judicial Circuit. Therefore, an emergency is hereby declared to exist and this act being necessary for the immediate preservation of the public peace, health and safety shall be in full force and effect from and after its passage and approval."

16-21-1701. Contingent expense allowance.

(a) The Prosecuting Attorney of the Twelfth Judicial District shall receive a contingent expense allowance to provide for office expenses, including telephone, telegraph, postage, printing, office supplies and equipment, office rent, stationery, traveling expenses, special services, operation of automobiles, and such other expenses which, within the discretion of the prosecuting attorney, may be a proper expense of the office, and also including necessary expense in connection with any proper investigation incidental to any criminal law violation or trials before any grand jury or any court within the Twelfth Judicial District, coming within the duties of his office.

(b)(1) The contingent expense allowance is to be borne by the respective counties of the Twelfth Judicial District as follows:

(A) Crawford County \$10,995.00; and

(B) Sebastian County \$99,375.34.

(2) Provided, the counties in the Twelfth Judicial District shall pay the above-prescribed annual amounts upon vouchers signed by the prosecuting attorney and allowed as claims against the county general revenue funds of the respective counties.

(c) The quorum courts may increase these amounts in their discretion, if necessary.

History. Acts 1995, No. 1148, § 2.

A.C.R.C. Notes. Former § 16-21-1701, concerning contingent expense allowance, is deemed to be superseded by this section. The former section was derived from Acts 1985, No. 500, § 2; A.S.A. 1947, § 24-114.4.

As enacted, subsection (a) began "Effective January 1, 1991, and thereafter."

As originally amended by Acts 1993, No. 312, § 2, subsection (a) of this section began: "Effective January 1, 1993, and thereafter."

As amended by Acts 1995, No. 1148, § 2, subsection (a) began: "Effective January 1, 1995, and thereafter."

Publisher's Notes. Acts 1991, No. 237, § 5, provided: "It is not the purpose of this act to repeal any laws now or hereafter enacted fixing the fees of prosecuting attorneys. In the Fort Smith and Greenwood Districts of Sebastian and in Crawford County, the Justices of the Peace, Municipal Courts, Circuit Courts and other courts shall assess in all cases the prosecuting attorney's fees provided by law. At the end of each calendar month and within five (5) days thereafter, the officers collecting such fees shall pay the same into the treasury of the county, except as herein otherwise provided, and shall

recieve from the treasurer his receipt in duplicate, one (1) copy of which shall be filed with the county clerk and the other copy kept by the officer or person making such settlement with the treasury. Any officer or person having in his hands any such fees who fails to settle with the county treasurer within the time and in the manner herein provided shall be subject to indictment, prosecution and punishment for embezzlement. It is further recognized that for the most important and complicated work performed by the prosecuting attorney of the counties affected by this act, fees are not provided by law. Therefore, it specifically is the legislative intent to provide the salaries herein set forth without regard to the amount of prosecuting attorney fees and emoluments earned or collected in the judicial circuit affected by this act."

Amendments. The 1993 amendment redesignated former (c) as present (b)(2) and redesignated former (d) as present (c); in (b)(1), substituted "\$19,498" for "\$14,632" and "\$53,409" for "\$52,284"; and, in present (b)(2), added "Provided" at the beginning and substituted "above-prescribed annual amounts" for "annual amounts prescribed in this section."

The 1995 amendment, in (b)(1), substi-

tuted "\$10,995.00" for "\$19,498" and substituted "\$99,375.34" for "\$53,409."

CASE NOTES

Cited: Villines v. Tucker, 324 Ark. 13, 918 S.W.2d 153 (1996).

16-21-1702. Appointment of deputies and employees.

The Prosecuting Attorney in the Twelfth Judicial District shall be entitled to the following assistants and deputies:

(1) CRAWFORD COUNTY. Two (2) or more deputies and two (2) or more secretaries whose total salaries shall be one hundred three thousand eight hundred thirty-four dollars (\$103,834) per annum; provided, that the quorum court may appropriate additional money for yearly salary increases or additional personnel in its discretion; and

(2) SEBASTIAN COUNTY. Nine (9) or more deputies and eleven (11) or more secretaries, whose total salaries shall be five hundred seventy-two thousand six hundred fifty-four dollars (\$572,654) per annum; provided, that the quorum court may appropriate additional money for yearly salary increases or additional personnel in its discretion.

History. Acts 1993, No. 312, § 1; 1995, No. 1148, § 1.

A.C.R.C. Notes. As originally enacted by Acts 1993, No. 312, § 1, this section began: "Effective January 1, 1993, and thereafter."

As amended by Acts 1995, No. 1448, § 1, subsection (a) of this section began: "Effective January 1, 1995, and thereafter."

Amendments. The 1995 amendment substituted "one hundred three thousand eight hundred thirty-four dollars

(\$103,834)" for "ninety-two thousand three hundred seventy-nine dollars (\$92,379)" in (1); and, in (2), substituted "Nine (9) or more deputies and eleven (11) or more secretaries" for "Eight (8) or more deputies and eight (8) or more secretaries" and substituted "five hundred seventy-two thousand six hundred fifty-four dollars (\$572,654)" for "five hundred ninety-five thousand seven hundred ninety-nine dollars and forty-nine cents (\$595,799.49); and made stylistic changes.

16-21-1703. Prosecutor and deputies — Power and authority.

(a) A deputy prosecuting attorney who is duly appointed in any county of the Twelfth Judicial District shall have the authority to perform all official acts as deputy prosecuting attorney in all counties within the Twelfth Judicial District.

(b) Deputy prosecuting attorneys in the Twelfth Judicial District shall not engage in the private practice of law.

(c)(1) The Prosecuting Attorney of the Twelfth Judicial District and those deputy prosecuting attorneys and other staff members he designates shall be considered law enforcement officers for the purposes of utilizing emergency, protective, and communications equipment.

(2) Provided, that the prosecuting attorney and all members of his office shall have no greater arrest powers than that accorded all citizens under the Arkansas Constitution and this Code.

(d) The prosecuting attorney shall have the power to appoint deputy prosecuting attorneys and other employees at such salaries as are authorized in the grant awards from the Department of Finance and Administration Drug Law Enforcement Program, and the federal Anti-Drug Abuse Act of 1986 or other federal programs and may expend funds from any federal program that are tendered to the office for official purposes.

(e) The Prosecuting Attorney of the Twelfth Judicial District, acting through the Twelfth Judicial District Drug Task Force, shall have the authority to expend funds from the Department of Finance and Administration Drug Law Enforcement Program, and the federal Anti-Drug Abuse Act of 1986 or other federal law enforcement program, which tenders funds to the office to be used for official purposes. Those funds that are designated "overtime funds" are authorized under the grant to be paid to law enforcement officers who are certified with various police agencies in the State of Arkansas. Law enforcement personnel who are employed by police agencies or sheriffs' offices, including the Department of Arkansas State Police, may receive these funds without being considered employees of the office of the Prosecuting Attorney of the Twelfth Judicial District. In addition, overtime funds paid these officers under this drug task force grant procedure are not to be construed as violating any legislative salary cap accorded these officers in the normal course of employment with their various agencies. These funds are intended to supplement funds provided to these departments as salaries to enhance the drug-fighting and violent crime-fighting capabilities of the Twelfth Judicial District Task Force and, to a larger extent, the State of Arkansas.

(f) The office of the Prosecuting Attorney of the Twelfth Judicial District is authorized to receive funds from the federal government in the name of the Twelfth Judicial District Task Force both from federal grants and from asset forfeiture funds and utilize those for official purposes as described in subsection (e) of this section.

(g) The prosecuting attorney's office is hereby authorized pursuant to this Code to collect fees for the hot check fund as authorized by the state legislature and to expend those funds in official uses for the benefit of the office.

History. Acts 1993, No. 312, § 3; 1995, No. 1148, § 3.

A.C.R.C. Notes. As originally enacted by Acts 1993, No. 312, § 3, this section provided, in part, that: "(d) The Prosecuting Attorney shall have the power to appoint Deputy Prosecuting Attorneys and other employees at such salaries as are authorized in the grant awards from the Department of Finance and Administration Drug Law Enforcement Program, Anti-Drug Abuse Act of 1986.

"(e) The Prosecuting Attorney acting through the Twelfth (12th) Judicial Cir-

cuit Drug Task Force shall have the authority to expend funds from the Department of Finance and Administration Drug Law Enforcement Program, Anti-Drug Abuse Act of 1986. Those funds that are designated 'overtime funds' are authorized under the grant to be paid to law enforcement officers who are certified with various police agencies in the State of Arkansas. Law enforcement personnel who are employed by police agencies or sheriffs' offices, including the State Police, may receive these funds without being considered employees of the Prosecuting

Attorney's Office. In addition, overtime funds paid these officers under this Drug Task Force Grant procedure are not to be construed as violating any legislative salary cap accorded these officers in the normal course of employment with their various agencies. These funds are intended to supplement funds provided to these departments as salaries to enhance the drug-fighting capabilities of the Twelfth (12th) Judicial Circuit Task Force and to a larger extent, the State of Arkansas, and will be paid with the knowledge of the cooperating agencies involved.

"(f) The Prosecuting Attorney's Office of the Twelfth (12th) Judicial Circuit is authorized to receive funds from the federal government in the name of the Twelfth (12th) Judicial Circuit Task Force both from federal grants and from asset forfeiture funds, and utilize those for official purposes as described in the above paragraph (e)."

As amended by Acts 1995, No. 1148, § 3, this section contained an additional

subsection which provided: "Account funds in the Restitution and Hot Check Accounts which are designated unclaimed by audit for a period of two years or more shall be placed in the Fee Account to be expended for official purposes only."

Amendments. The 1995 amendment deleted "shall be residents of the Twelfth Judicial District and" following "District" in (b); deleted "in coordination with inter-agency cooperative investigations and operations" from the end in (c)(1); substituted "this Code" for "Arkansas statutes" in (c)(2); inserted (d)-(f), redesignating former (d) as (g); and substituted "this Code" for "state statutes" in (g).

U.S. Code. The reference in this section to the Drug Law Enforcement Program Anti-Abuse Act of 1986 is probably a reference to a former version of 42 U.S.C. § 3796h, repealed in 1988, which contained provisions relating to grants for drug law enforcement programs.

Cross References. Fees from persons issuing bad checks, § 16-21-120.

16-21-1704. Appropriations by quorum courts.

The quorum courts of the respective counties within the judicial district shall annually appropriate out of the general revenue funds sufficient to cover the salaries and contingent expense fund provided for in this subchapter, provided that the quorum courts shall not be required to pay any additional amounts except by their consent.

History. Acts 1993, No. 312, § 4; 1995, No. 1148, § 4.

A.C.R.C. Notes. As amended by Acts 1995, No. 1148, § 4, this section ended: "Provided however, that in the event that the district is separated into two districts or one county is removed from the district by state action, the shared time personnel currently funded by Sebastian County will be funded full time by Sebastian County. Provided further, that in the event that a Deputy within the district is selected to be interim Prosecutor said Deputy may take a leave of absence to fulfill this duty. Upon completion of said duty, the Deputy shall be entitled to return to either District's Prosecutor's Office with the consent of the Prosecuting Attorney at the level of funding that said Deputy would have been paid at had he not accepted the appointment duty. The Prosecutor of the Twelfth Circuit, at the request of the interim Prosecutor of the new

District, may designate a Deputy to serve as the Deputy Prosecuting Attorney of the new District. In the event that this procedure is followed, that Deputy shall be able to return to Sebastian County at the same pay as he is receiving at the time he is transferred back to Sebastian County from Crawford County at the end of the interim Prosecutor's term or any time before hand. For purposes of this Act, the new District shall be considered the one which is formed with Crawford County as a member county. Upon division, the prosecutor shall transfer all district equipment to Crawford County that is currently placed within the Crawford County Office at the time of the effective date of this Act and all equipment assigned to full time Crawford County personnel at the effective date of the separation Act."

Amendments. The 1995 amendment deleted (b); and substituted "in this subchapter" for "herein."

SUBCHAPTER 18 — THIRTEENTH JUDICIAL DISTRICT

SECTION.

16-21-1801. Contingent expense allowances.

A.C.R.C. Notes. Acts 1989, No. 585, § 1, provided: "In addition to the deputy prosecutor positions created by § 16-21-113 and other Arkansas Code provisions, the prosecuting attorneys of the Eighth, Ninth-West, Tenth, Thirteenth, Sixteenth and Twentieth Judicial Districts shall have the power to appoint deputy prosecuting attorneys, investigators, or employees at such salaries as are authorized in the grant awards from the Department of Finance and Administration, Intergovernmental Services, Drug Law Enforcement Program, Anti-Drug Abuse Act of 1986. Said investigators and case coordinators shall have jurisdiction throughout the judicial district served, and have the power granted to peace officers by the statutes of this State and may serve process issuing out of all courts within the judicial district."

Publisher's Notes. Acts 1988 (4th Ex. Sess.), No. 10, §§ 1, 2, and No. 20, §§ 1, 2, provide that, in addition to the deputy prosecutor positions created by § 16-21-113 and other statutory provisions, the Prosecuting Attorney of the Thirteenth Judicial District shall have the power to appoint deputy prosecuting attorneys, investigators, or employees at such salaries as are authorized in the grant awards from the Department of Finance and Administration, Intergovernmental Ser-

vices, Drug Law Enforcement Program, Anti-Drug Abuse Act of 1986; that the investigators and case coordinators shall have jurisdiction throughout the judicial district served, have the power granted to peace officers by the statutes of this state, and may serve process issuing out of all courts within the judicial district; and that nothing in these acts shall be construed to prohibit the quorum courts or city governing bodies of the various judicial districts from providing additional personnel or funds, from whatever sources available, to the prosecuting attorneys' offices for the Anti-Drug Abuse program.

Effective Dates. Acts 1985, No. 1093, § 3: retroactive to Jan. 1, 1985. Emergency clause provided: "It has been ascertained and determined that due to increased costs that the current laws pertaining to the expense allowance of the prosecuting attorney of the Thirteenth Judicial Circuit is inadequate and that the efficient operation of the courts and the administration of justice in the Thirteenth Judicial Circuit will be jeopardized. Therefore, an emergency is hereby declared to exist and this Act being necessary for the immediate preservation of the public peace, health and safety, shall be in full force and effect from and after its passage and approval."

16-21-1801. Contingent expense allowances.

(a) In implementation of § 16-21-119(a), and in lieu of any other contingent expense allowance provided by law for the Prosecuting Attorney of the Thirteenth Judicial District, the Prosecuting Attorney shall receive an expense allowance to be borne by the respective counties of the Thirteenth Judicial District as follows:

- (1) Calhoun County Such amount as may be approved by the Quorum Court of Calhoun County, not to exceed one thousand seven hundred eighty-two dollars (\$1,782) per annum;

- (2) Columbia County Such amount as may be approved by the Quorum Court of Columbia County, not to exceed three thousand seven hundred eighty dollars (\$3,780) per annum;
- (3) Cleveland County Such amount as may be approved by the Quorum Court of Cleveland County, not to exceed one thousand eight hundred dollars (\$1,800) per annum;
- (4) Dallas County Such amount as may be approved by the Quorum Court of Dallas County, not to exceed two thousand dollars (\$2,000) per annum;
- (5) Ouachita County Such amount as may be approved by the Quorum Court of Ouachita County, not to exceed four thousand one hundred forty dollars (\$4,140) per annum; and
- (6) Union County Such amount as may be approved by the Quorum Court of Union County, not to exceed six thousand six hundred sixty dollars (\$6,660) per annum.

(b) The counties in the Thirteenth Judicial District shall pay the annual amounts prescribed in this section in equal monthly installments.

(c) There shall be no requirement that the prosecuting attorney submit vouchers to the respective counties in connection with the expenses.

History. Acts 1985, No. 1093, §§ 1, 2; A.S.A. 1947, § 24-114.3.

SUBCHAPTER 19 — FOURTEENTH JUDICIAL DISTRICT

SECTION.

- 16-21-1901. Legislative findings and intent.
- 16-21-1902. Prosecuting attorney's fees.
- 16-21-1903. Contingent expense allowance.

SECTION.

- 16-21-1904. Office stenographer.
- 16-21-1905. Increase in amounts.

Effective Dates. Acts 1977, No. 950, §§ 4, 5: retroactive to Jan. 1, 1977. Emergency clause provided: "It is hereby found and determined that the efficient operation of the office of the prosecuting attorney of the Fourteenth Judicial Circuit is essential to the administration of justice and for the efficient operation of the county governments of said circuit, and that the immediate passage of this Act is necessary to provide adequate contingent

expenses and secretarial allowances for said prosecuting attorney. Therefore, an emergency is hereby declared to exist, and this Act being immediately necessary for the preservation of the public peace, health, and safety, shall be in full force and effect from and after its passage and approval."

Acts 1979, No. 457, §§ 4, 6: retroactive to Jan. 1, 1979; Acts 1981, No. 952, §§ 4, 6: retroactive to Jan. 1, 1981. Emergency

clauses provided: "It is hereby found and determined by the General Assembly that the Fourteenth Judicial Circuit prosecuting attorney's office lacks sufficient manpower; and that in order to assure the proper administration of justice and the efficient functioning of the office of the prosecuting attorney for the Fourteenth Judicial Circuit, it is necessary that this Act become effective immediately. Therefore, an emergency is hereby declared to exist and this Act, being necessary for the immediate preservation of the public peace, health, and safety, shall become effective from and after its passage and approval."

Acts 1983, No. 388, § 3: Mar. 10, 1983. Emergency clause provided: "It is hereby found and determined by the General Assembly that the contingent expense allowance for the Fourteenth Judicial Circuit prosecuting attorney and the salary of the office stenographer for such prosecuting attorney should not be limited in amount by the General Assembly and this Act is immediately necessary to eliminate such limitations. Therefore, an emergency is hereby declared to exist and this Act being immediately necessary for the preservation of the public peace, health and safety shall be in full force and effect from and after its passage and approval."

16-21-1901. Legislative findings and intent.

(a) It is not the purpose of this subchapter to repeal any laws fixing the fees of prosecuting attorneys, but rather to update and make more efficient the administration of law and order and the operation of county governments in the Fourteenth Judicial District.

(b) It is further recognized that for the most important and complicated work performed by the prosecuting attorney of the several counties of the Fourteenth Judicial District affected by this subchapter, fees are not provided by law. Therefore, it is the intent of this subchapter to provide the salaries set forth in this subchapter without regard to the amount of the prosecuting attorney's fees and emoluments earned or collected in the counties comprising the Fourteenth Judicial District.

History. Acts 1977, No. 950, § 3;
A.S.A. 1947, § 24-114.1b.

16-21-1902. Prosecuting attorney's fees.

In the Fourteenth Judicial District, the justices of the peace, municipal courts, circuit courts, and other courts shall assess, in all cases, the prosecuting attorney's fees provided by law, and all such fees shall be paid into the county treasury as provided by law.

History. Acts 1977, No. 950, § 3;
A.S.A. 1947, § 24-114.1b.

16-21-1903. Contingent expense allowance.

The contingent expenses of the Prosecuting Attorney for the Fourteenth Judicial District shall be limited to the sum of seven thousand eight hundred dollars (\$7,800) per annum, to be paid quarterly and to be borne by the counties of the district as follows:

- (1) Baxter County (36% by population) \$2,808;
- (2) Boone County..... (36% by population) 2,808;
- (3) Marion County..... (16% by population) 1,248; and
- (4) Newton County..... (12% by population) 936.

History. Acts 1977, No. 950, § 1; 1979, No. 457, § 1; 1981, No. 952, § 1; A.S.A. 1947, § 24-114.1.

16-21-1904. Office stenographer.

The salary for the office stenographer for the Prosecuting Attorney of the Fourteenth Judicial District shall be set at the sum of nine thousand dollars (\$9,000) annually, to be paid in equal monthly installments and to be borne by the counties of the district as follows:

- (1) Baxter County (36%) \$3,240;
- (2) Boone County..... (36%) 3,240;
- (3) Marion County..... (16%) 1,440; and
- (4) Newton County..... (12%) 1,080.

History. Acts 1977, No. 950, § 2; 1979, No. 457, § 2; 1981, No. 952, § 2; A.S.A. 1947, § 24-114.1a.

16-21-1905. Increase in amounts.

The amounts set forth in §§ 16-21-1903 and 16-21-1904 are minimum amounts, and each county quorum court may increase the amounts paid for either purpose when the quorum court feels it is justified and appropriate to do so without regard to similar increases by other counties in the judicial district.

History. Acts 1983, No. 388, § 1; A.S.A. 1947, §§ 24-114.1n, 24-114.1a note.

SUBCHAPTER 20 — FIFTEENTH JUDICIAL DISTRICT

SECTION.

- 16-21-2001. Legislative findings and intent.
- 16-21-2002. Office space and telephone expense — Contingent expense allowance.
- 16-21-2003. Prosecutor's fees — Collection, payment, and settlement — Penalty for non-compliance.

SECTION.

- 16-21-2004. Prosecutor's assistants generally — Salaries.
- 16-21-2005. Prosecutor's assistants — Expenses.
- 16-21-2006. Payment of salaries and expenses.
- 16-21-2007. Additional employees — Drug Law Enforcement Program grants.

Effective Dates. Acts 1981, No. 298, § 5: became law without governor's signature, Mar. 5, 1981. Emergency clause provided: "It is hereby found and determined by the General Assembly that there is presently no law which provides adequate compensation and allowances for the prosecuting attorney of the Fifteenth Judicial Circuit; that this Act is designed to establish adequate allowances for said prosecuting attorney to enable him to effectively and efficiently carry out his duties; that it is essential to the effective administration of justice in the Fifteenth Judicial Circuit that this Act be given effect at the earliest possible date; therefore, an emergency is hereby declared to exist and this Act, being necessary for the immediate preservation of the public peace, health, and safety, shall be in full force and effect from and after its passage and approval."

Acts 1991, No. 425, § 5: Mar. 11, 1991. Emergency clause provided: "It is hereby found and determined by the General Assembly that there is an urgent need for additional personnel to fight the war on

drugs. Therefore, an emergency is hereby declared to exist and this act being necessary for the immediate preservation of the public peace, health and safety shall be in full force and effect from and after its passage and approval."

Acts 1993, No. 361, § 5: Mar. 3, 1993. Emergency clause provided: "It is hereby found and determined by the General Assembly that no attorney at law resides within Scott County who can legally serve as the deputy prosecuting attorney for the county; that this act authorizes a non-resident of Scott County to serve as the deputy prosecuting attorney for Scott County; and that this act should be given effect immediately in order to give the prosecuting attorney of the Fifteenth Judicial District the authority to provide services within the district as soon as possible. Therefore, an emergency is hereby declared to exist and this act being necessary for the immediate preservation of the public peace, health and safety shall be in full force and effect from and after its passage and approval."

16-21-2001. Legislative findings and intent.

(a) It is not the purpose of this subchapter to repeal any laws fixing the fees of prosecuting attorneys.

(b) It is further recognized that for the most important and complicated work performed by the prosecuting attorney of the counties affected by this subchapter, fees are not provided by law. Therefore, it is specifically a legislative intent to provide the salaries set forth in this subchapter without regard to the amount of prosecuting attorney's fees and emoluments earned or collected in the judicial district affected by this subchapter.

History. Acts 1981, No. 298, § 4; A.S.A. 1947, § 24-114.11c.

16-21-2002. Office space and telephone expense — Contingent expense allowance.

(a)(1) The Prosecuting Attorney of the Fifteenth Judicial District shall be furnished suitable office space and telephone expense.

(2) The office space is to be furnished in the county in which the prosecuting attorney resides and shall be paid for by that county monthly at the rate of two hundred dollars (\$200) per month from the county general fund.

(3) The telephone expense shall be prorated one-fifth ($\frac{1}{5}$) from Scott County, the balance equally between Logan County, Yell County, and Conway County.

(b)(1) In addition, the prosecuting attorney shall be allowed as contingent expense of this office, including postage, printing, office supplies and equipment, stationery, travel expense, special service, operation of automobiles, and such other expenses which, within the discretion of the prosecuting attorney, may be proper expenses of the office, and also including necessary expense in connection with any proper investigation incident to any criminal law violation or trial before any grand jury or any court within the Fifteenth Judicial District, coming within the duties of his office, eleven thousand three hundred dollars (\$11,300) per annum, to be allocated as follows:

- (A) Scott County \$2,500;
- (B) Logan County \$3,000;
- (C) Yell County \$2,500; and
- (D) Conway County \$3,300.

(2) The expenses are to be paid from the county general fund of the respective counties of the Fifteenth Judicial District and shall be paid in equal monthly installments by each county.

History. Acts 1981, No. 298, § 2;
A.S.A. 1947, § 24-114.11a; Acts 1987, No.
415, § 1.

**16-21-2003. Prosecutor’s fees — Collection, payment, and settle-
ment — Penalty for noncompliance.**

(a) In all counties of the Fifteenth Judicial District, the justices of the peace, municipal courts, circuit courts, and other courts shall assess in all cases the prosecuting attorney’s fee provided by law.

(b) At the end of each calendar month and within five (5) days thereafter, the officer collecting the fees shall pay the fees to the treasury of the county, except as otherwise provided in this subchapter, and shall receive from the treasurer his receipt in duplicate, one (1) copy of which shall be filed with the county clerk, the other copy kept by the officer or person making the settlement with the treasurer.

(c) Any officer or person having in his hands any such fees who fails to settle with the county treasurer within the time and the manner provided for in this section shall be subject to indictment, prosecution, and punishment for embezzlement.

History. Acts 1981, No. 298, § 4;
A.S.A. 1947, § 24-114.11c.

16-21-2004. Prosecutor's assistants generally — Salaries.

(a) The Prosecuting Attorney of the Fifteenth Judicial District of Arkansas shall be entitled to the following assistants:

(1) Deputy prosecuting attorneys:

(A) Scott County	\$10,000;
(B) Logan County	\$16,000;
(C) Yell County	\$13,977;
(D) Conway County	\$18,000;

(2) Chief deputy prosecuting attorney:

(A) Scott County	\$3,300;
(B) Logan County	\$3,300;
(C) Yell County	\$3,240;
(D) Conway County	\$4,400;

(3) Secretary-stenographer:

(A) Scott County	\$1,850;
(B) Logan County	\$2,500;
(C) Yell County	\$2,333;
(D) Conway County	\$2,465; and

(4) Investigator:

(A) Scott County	\$2,750;
(B) Logan County	\$3,750;
(C) Yell County	\$3,600;
(D) Conway County	\$3,750.

(b) The salaries of the above deputy prosecutors, secretary-stenographer, and investigator shall be paid in twelve (12) monthly installments from the respective county general funds as set forth in subsection (a) of this section.

(c) The deputy prosecuting attorneys shall receive the salaries provided for in this subchapter in lieu of fees, and all such fees shall be deposited in the general funds of the respective counties.

(d) All deputies shall reside in the Fifteenth Judicial District; provided, however, that the deputy prosecuting attorney for Scott County may reside outside the Fifteenth Judicial District so long as he maintains a regular practice of law within Scott County.

(e) The Prosecuting Attorney of the Fifteenth Judicial District shall have the power to appoint deputy prosecuting attorneys, criminal investigators, and all other assistants without confirmation from any court or other tribunal.

(f) The investigator or warrant clerk shall have all powers granted to peace officers by the statutes of this state for the serving of all process issuing out of all courts or the prosecuting attorney's office.

History. Acts 1981, No. 298, §§ 1, 3; A.S.A. 1947, §§ 24-114.11, 24-114.11b; Acts 1993, No. 361, § 1.

Amendments. The 1993 amendment added the proviso at the end of (d).

CASE NOTES

Cited: Bell v. State, 334 Ark. 285, 973 S.W.2d 806 (1998).

16-21-2005. Prosecutor's assistants — Expenses.

(a) The deputy prosecuting attorney's office shall be entitled to an expense allowance for travel, telephone, and other related expenses from the county general fund in a minimum amount as follows:

- (1) Scott County \$ 1,500;
- (2) Logan County \$ 4,000;
- (3) Yell County \$ 2,000; and
- (4) Conway County \$14,025.

(b) The chief deputy prosecuting attorney's office shall be entitled to an expense allowance for travel, telephone, and other related expenses from the county general fund in a minimum amount of two thousand three hundred five dollars (\$2,305), payable from the county's general funds as follows:

- (1) Scott County \$550;
- (2) Logan County \$550;
- (3) Yell County \$500; and
- (4) Conway County \$705.

(c) The investigator's office shall be entitled to an expense allowance for travel, telephone, and other related expenses from the county general fund in a minimum amount of three thousand nine hundred ten dollars (\$3,910), payable from the county's general funds as follows:

- (1) Scott County \$ 800;
- (2) Logan County \$1,075;
- (3) Yell County \$ 960; and
- (4) Conway County \$1,075.

History. Acts 1981, No. 298, § 1; A.S.A. 1947, § 24-114.11.

16-21-2006. Payment of salaries and expenses.

The levying or quorum court of the respective counties shall annually appropriate out of the general revenue fund sufficient amounts to cover the salaries and expenses provided for in this subchapter.

History. Acts 1981, No. 298, § 3; A.S.A. 1947, § 24-114.11b.

16-21-2007. Additional employees — Drug Law Enforcement Program grants.

(a) The Prosecuting Attorney of the Fifteenth Judicial District shall have the power to appoint the following employees if the prosecutor receives a grant award therefor, without confirmation of any court or tribunal, at such salaries as are indicated below, or as are authorized in

grants awarded from the Office of Intergovernmental Services of the Department of Finance and Administration and the Arkansas Drug Law Enforcement Program:

- | | |
|---|---------------|
| (1) Law enforcement project coordinator | \$26,000; |
| (2) Law enforcement field supervisor | \$22,000; |
| (3) Law enforcement undercover officer | \$16,500; |
| (4) Law enforcement undercover officer | \$15,125; |
| (5) Bookkeeper-secretary | \$14,000; and |
| (6) Bookkeeper-secretary | \$11,000. |

(b)(1) The positions created in subsection (a) of this section shall be in addition to those created by § 16-21-113 and other Arkansas Code provisions.

(2) In the event additional funding becomes available, the prosecuting attorney may employ such additional employees and have expense allowances as are authorized in the Office of Intergovernmental Services of the Department of Finance and Administration and Drug Law Enforcement Program grant awards.

(c) The office of the Prosecuting Attorney for the Fifteenth Judicial District shall administer its Drug Law Enforcement Program grant from the Office of Intergovernmental Services of the Department of Finance and Administration. Expenditures may be made only for purposes of the grant. All moneys from the grant are appropriated on a continuing basis and are subject to § 10-4-209, the prosecuting attorneys' financial management system. All law enforcement agent positions shall have peace officer jurisdiction throughout the Fifteenth Judicial District and may serve process issuing out of all courts within the state.

(d) It is the explicit legislative intent that nothing in this section shall be construed to decrease, supplant, or be substituted for employee positions, salaries, or expenses, nor maintenance and operation expenses or capital equipment expenditures which the office of the Prosecuting Attorney of the Fifteenth Judicial District Office will receive through quorum court appropriation from and after February 1, 1991.

History. Acts 1991, No. 425, § 1.

A.C.R.C. Notes. As enacted (a) began "Effective February 1, 1991."

SUBCHAPTER 21 — SIXTEENTH JUDICIAL DISTRICT

SECTION.

16-21-2101. Expense allowance — Salary of deputy.

A.C.R.C. Notes. Acts 1989, No. 585, § 1, provided: "In addition to the deputy prosecutor positions created by § 16-21-113 and other Arkansas Code provisions,

the prosecuting attorneys of the Eighth, Ninth-West, Tenth, Thirteenth, Sixteenth and Twentieth Judicial Districts shall have the power to appoint deputy prose-

cuting attorneys, investigators, or employees at such salaries as are authorized in the grant awards from the Department of Finance and Administration, Intergovernmental Services, Drug Law Enforcement Program, Anti-Drug Abuse Act of 1986. Said investigators and case coordinators shall have jurisdiction throughout the judicial district served, and have the power granted to peace officers by the statutes of this State and may serve process issuing out of all courts within the judicial district.”

Publisher’s Notes. Acts 1988 (4th Ex. Sess.), No. 10, §§ 1, 2, and No. 20, §§ 1, 2, provide that, in addition to the deputy prosecutor positions created by § 16-21-113 and other statutory provisions, the Prosecuting Attorney of the Sixteenth Judicial District shall have the power to appoint deputy prosecuting attorneys, investigators, or employees at such salaries as are authorized in the grant awards from the Department of Finance and Administration, Intergovernmental Services, Drug Law Enforcement Program, Anti-Drug Abuse Act of 1986; that the investigators and case coordinators shall have jurisdiction throughout the judicial district served, have the power granted to peace officers by the statutes of this state,

and may serve process issuing out of all courts within the judicial district; and that nothing in these acts shall be construed to prohibit the quorum courts or city governing bodies of the various judicial districts from providing additional personnel or funds, from whatever sources available, to the prosecuting attorneys’ offices for the Anti-Drug Abuse program.

Effective Dates. Acts 1987, No. 1044, §§ 3, 5: effective retroactive to Jan. 1, 1987. Emergency clause provided: “It is hereby found and determined by the General Assembly that it is essential to the effective and efficient administration of justice in the Sixteenth Judicial Circuit that the prosecuting attorney of said circuit be provided adequate funds for expenses of his office and for carrying out his official functions and duties; that this Act makes provision for the funding of such expenses, and should be given effect immediately. Therefore, an emergency is hereby declared to exist and this Act being necessary for the preservation of the public peace, health and safety shall be in full force and effect from and after its passage and approval.” Became law without Governor’s signature. Noted in Governor’s office on Apr. 14, 1987.

16-21-2101. Expense allowance — Salary of deputy.

(a) The Prosecuting Attorney of the Sixteenth Judicial District may be allowed the expenses of his office, including telephone, telegraph, postage, printing, office supplies and equipment, office rent, stationery, traveling expenses, special services, operation of automobiles, secretarial and clerical expenses, and other expenses which, within the discretion of the prosecuting attorney, may be a proper expense of the office and also including necessary expense in connection with any proper investigation incident to any criminal law violation or trials before any grand jury, or any court within the judicial district, coming within the duties of his office.

(b) Subject to approval of the several quorum courts, the expenses shall be borne by the counties comprising the Sixteenth Judicial District, as follows:

- (1) Independence County forty percent (40%);
- (2) Cleburne County twenty-seven percent (27%);
- (3) Stone County eleven percent (11%);
- (4) Izard County eleven percent (11%); and
- (5) Fulton County eleven percent (11%).

(c) The expenses may be drawn in equal monthly installments or be contingent.

(d) The deputy prosecuting attorney for Stone County shall receive an annual salary of not less than twelve thousand dollars (\$12,000) nor more than eighteen thousand eight hundred dollars (\$18,800), as established by the Quorum Court of Stone County.

History. Acts 1987, No. 1044, §§ 1, 2; 1989, No. 470, § 1.

SUBCHAPTER 22 — SEVENTEENTH JUDICIAL DISTRICT

SECTION.

16-21-2201. Election.

16-21-2202. Contingent expense allowance.

SECTION.

16-21-2203. Expense allowance — Seventeenth Judicial District-East.

Effective Dates. Acts 1971, No. 262, §§ 3, 6: retroactive to Jan. 1, 1971. Emergency clause provided: "It is hereby found and determined by the General Assembly that the contingent expense allowance of the prosecuting attorney's office of the 17th Judicial Circuit and the salary of the official stenographer and grand jury reporter of said 17th Judicial Circuit are inadequate for the administration of justice in said circuit, and that the immediate passage of this Act is necessary to provide sufficient allowances therefor and to promote the administration of justice and the enforcement of the criminal laws of said circuit. Therefore, an emergency is hereby declared to exist and this Act being necessary for the immediate preservation of the public peace, health and safety shall be in full force and effect from and after its passage and approval." Approved March 10, 1971.

Acts 1979, No. 443, §§ 2, 5: retroactive to Jan. 1, 1979. Emergency clause provided: "It is hereby found and determined by the General Assembly that the contingent expense allowance of the prosecuting attorney's office of the 17th Circuit-Chancery Court Circuit is inadequate for the administration of justice in said circuit, and that the immediate passage of this Act is necessary to provide sufficient allowances therefor and to promote the administration of justice and the enforcement of the criminal laws of said circuit. Therefore, an emergency is hereby declared to exist and this Act being neces-

sary for the immediate preservation of the public peace, health and safety shall be in full force and effect from and after its passage and approval."

Acts 1987, No. 1043, § 4: became law without Governor's signature, Apr. 15, 1987. Emergency clause provided: "It is hereby found and determined by the General Assembly that this Act is essential to the operation of criminal justice within the Seventeenth East Judicial Circuit. Therefore, an emergency is hereby declared to exist and this Act, being necessary for the immediate preservation of public peace, health and safety shall be in full force and effect from and after its passage and approval."

Acts 1995, No. 886, § 7: became law without Governor's signature. Noted Mar. 31, 1995. Emergency clause provided: "It is hereby found and determined by the General Assembly that this act is essential to the operation of the criminal justice system within the Seventeenth Judicial District-East. It is also hereby found and determined by the General Assembly that the Prosecuting Attorney of the Seventeenth Judicial District-East is in need of these personnel in order to fight the war on drugs and combat violent crime in the Seventeenth Judicial District-East. Therefore, an emergency is hereby declared to exist and this act being necessary for the immediate preservation of the public peace, health and safety shall be in full force and effect from and after its passage and approval."

Acts 1997, No. 988, § 6: Apr. 1, 1997, retroactive to Jan. 1, 1997. Emergency clause provided: "It is found and determined by the General Assembly of the State of Arkansas that this act is essential to the operation of the criminal justice system within the Seventeenth Judicial District-East. It is also determined that the prosecuting attorney of the Seventeenth Judicial District-East is in need of these personnel in order to fight the war on drugs and combat crime in the Seventeenth Judicial District-East. Therefore an emergency is declared to exist and this act being immediately necessary for the preservation of the public peace, health and safety shall become effective on the date of its approval by the Governor. If the bill is neither approved nor vetoed by the Governor, it shall become effective on the expiration of the period of time during which the Governor may veto the bill. If the bill is vetoed by the Governor and the veto is overridden, it shall become effective on the date the last house overrides the veto."

Acts 1999, No. 1001, § 6: Mar. 31, 1999, retroactive to Jan. 1, 1999. Emergency clause provided: "It is hereby found and determined by the Eighty-second General Assembly that this act is essential to the operation of the criminal justice system within the Seventeenth Judicial District-East. It is also determined that the prosecuting attorney of the Seventeenth Judicial District-East is in need of these personnel in order to fight the war on drugs and combat crime in the Seventeenth Judicial District-East. Therefore, an emergency is declared to exist and this act being immediately necessary for the preservation of the public peace, health and safety shall become effective on the date of its approval by the Governor. If the bill is neither approved nor vetoed by the Governor, it shall become effective on the expiration of the period of time during which the Governor may veto the bill. If the bill is vetoed by the Governor and the veto is overridden, it shall become effective on the date the last house overrides the veto."

16-21-2201. Election.

- (a) The qualified electors of the Seventeenth Judicial District-West shall elect one (1) prosecuting attorney.
- (b) The qualified electors of the Seventeenth Judicial District-East shall elect one (1) prosecuting attorney.

History. Acts 1977, No. 432, § 1; 1983, No. 669, § 1; A.S.A. 1947, § 22-365.

CASE NOTES

Cited: Beaumont v. Adkisson, 267 Ark. 511, 593 S.W.2d 11 (1980).

16-21-2202. Contingent expense allowance.

- (a) In lieu of any other contingent expense allowance now provided by law for the Prosecuting Attorney of the Seventeenth Judicial District, the prosecuting attorney shall receive a contingent expense allowance of three thousand six hundred dollars (\$3,600) per annum to be borne by the respective counties of the Seventeenth District as follows:
- (1) White County \$1,400;
 - (2) Lonoke County \$1,200; and
 - (3) Prairie County \$1,000.

(b)(1) The counties shall pay the above authorized annual amounts in equal quarterly installments from the county general funds of the respective counties.

(2) The payment of each county's pro rata part of the contingent expense allowance shall be upon approval of the county judge of each of the respective counties.

History. Acts 1971, No. 262, § 2; 1979, No. 443, § 1; A.S.A. 1947, § 24-114.6.

CASE NOTES

Cited: Villines v. Tucker, 324 Ark. 13, 918 S.W.2d 153 (1996).

16-21-2203. Expense allowance — Seventeenth Judicial District-East.

(a) The office of the Prosecuting Attorney of the Seventeenth Judicial District-East shall receive a contingent expense reimbursement of two thousand four hundred dollars (\$2,400) per annum to be borne by the respective counties of the Seventeenth Judicial District-East as follows:

- (1) White County \$1,400; and
- (2) Prairie County 1,000.

(b)(1) The counties shall pay the authorized annual amounts in equal quarterly installments from the county general fund of the respective counties, and the checks shall be made payable to the office of the Prosecuting Attorney of the Seventeenth Judicial District-East.

(2) Disbursements shall be made by the prosecuting attorney for the necessary expenses of the office based upon adequate documentation.

(c) The prosecuting attorney or deputies may also be allowed additional expenses upon appropriation of the quorum court and approval of the county judge.

(d) The Prosecuting Attorney of the Seventeenth Judicial District-East shall be entitled to the following assistants and employees:

- (1)(A) One (1) chief deputy prosecuting attorney, whose salary shall be not less than forty-five thousand one hundred twenty-eight dollars (\$45,128) per annum.

(B) The salary is to be paid in accordance with the pay periods and payroll policy for county employees of White County.

(C) In addition to the salary, social security, matching retirement, insurance, and all related salary expenses shall be paid by White County;

- (2)(A)(i) One (1) deputy prosecuting attorney for White County, whose salary shall be not less than thirty-five thousand eighteen dollars (\$35,018) per annum.

(ii) The salary is to be paid in accordance with the pay periods and payroll policy for county employees of White County.

(iii) In addition to the salary, social security, matching retirement, insurance, and all related salary expenses shall be paid by White County;

(B)(i) One (1) deputy prosecuting attorney for White County, whose salary shall be not less than thirty-one thousand one hundred dollars (\$31,100) per annum.

(ii) The salary is to be paid in accordance with the pay periods and payroll policy for county employees of White County.

(iii) In addition to the salary, social security, matching retirement, insurance, and all related salary expenses shall be paid by White County;

(3)(A)(i) One (1) deputy prosecuting attorney for Prairie County, whose salary shall be not less than thirty-three thousand three hundred forty-two dollars (\$33,342) per annum.

(ii) The salary is to be paid in accordance with the pay periods and payroll policy for county employees of Prairie County.

(iii) In addition to the salary, social security, matching retirement, insurance, and all related salary expenses shall be paid by Prairie County.

(B) The deputy prosecuting attorney for Prairie County shall be entitled to actual operating expenses of not less than thirteen thousand six hundred forty-six dollars (\$13,646) to cover the cost of telephone, printing, supplies, equipment, janitorial services, cleaning supplies, food, service contracts, accounting, postage, photocopies, travel, training, utilities, rent, juror and witness fees, and such other expenses which, within the discretion of the prosecuting attorney, may be proper expenses of the office in connection with the investigation and prosecution of criminal activity within the district, to be paid by Prairie County;

(4)(A) One (1) victim/witness coordinator and office manager, whose salary shall be not less than twenty-three thousand two hundred ninety-two dollars (\$23,292).

(B) The salary is to be paid in accordance with the pay periods and payroll policy of White County.

(C) In addition to the salary, social security, matching retirement, insurance, and all related salary expenses shall be paid by White County;

(5)(A) One (1) victim/witness clerk, whose salary shall be not less than eighteen thousand seven hundred forty-four dollars (\$18,744).

(B) The salary is to be paid in accordance with the pay periods and payroll policy of White County.

(C) In addition to the salary, social security, matching retirement, insurance, and all related salary expenses shall be paid by White County;

(6)(A) One (1) receptionist and municipal intake clerk, whose salary shall be not less than eighteen thousand seven hundred forty-four dollars (\$18,744) per annum.

(B) The salary is to be paid in accordance with the pay periods and payroll policy of White County.

(C) In addition to the salary, social security, matching retirement, insurance, and all related salary expenses shall be paid by White County;

(7)(A) One (1) hot check clerk, whose salary shall be not less than seventeen thousand five hundred dollars (\$17,500) per annum.

(B) The salary is to be paid in accordance with the pay periods and payroll policy of White County.

(C) In addition to the salary, social security, matching retirement, insurance, and all related salary expenses shall be paid by White County; and

(8)(A) One (1) clerk, whose salary shall be not less than twelve thousand six hundred dollars (\$12,600) per annum.

(B) The salary shall be paid in accordance with the pay periods and payroll policy of Prairie County.

(C) In addition to said salary, social security, matching retirement, insurance, and all related salary expenses shall be paid by Prairie County.

(e)(1) The quorum courts of the respective counties of the Seventeenth Judicial District-East shall annually appropriate out of the funds sufficient amounts to cover the salaries and expenses provided for in this section.

(2) The salaries and expenses provided in this section are minimum provisions only, and the quorum courts of the respective counties may appropriate any additional funds they deem necessary for the efficient operation of the office of the prosecuting attorney.

(f) A deputy prosecuting attorney who is duly appointed in any county of the Seventeenth Judicial District-East shall have the authority to perform all official acts as deputy prosecuting attorney in all counties within the district.

History. Acts 1995, No. 886, §§ 1-3; 1997, No. 988, § 1; 1999, No. 1001, § 1.

A.C.R.C. Notes. As enacted by Acts 1995, No. 886, § 1, subsection (d) of this section began: "Retroactive to January 1, 1995 and thereafter."

Publisher's Notes. Former § 16-21-2203, concerning Seventeenth Judicial

District-East expense allowance, was repealed by implication by Acts 1995, No. 886. The former section was derived from Acts 1987, No. 1043, §§ 1, 2.

Amendments. The 1997 amendment rewrote this section.

The 1999 amendment rewrote this section.

CASE NOTES

Cited: Villines v. Tucker, 324 Ark. 13, 918 S.W.2d 153 (1996).

SUBCHAPTER 23 — EIGHTEENTH JUDICIAL DISTRICT

SECTION.

16-21-2301. Expense allowance.

16-21-2301. Expense allowance.

The Garland County Quorum Court may appropriate from the county treasury such funds as it deems necessary to defray the expenses of the Prosecuting Attorney of the Eighteenth Judicial District-East.

History. Acts 1987, No. 669, § 1.

SUBCHAPTER 24 — NINETEENTH JUDICIAL DISTRICT

SECTION.

16-21-2401. Contingent expense allowance.

16-21-2402. Reimbursement of expenses of Benton County office.

SECTION.

16-21-2403. Reimbursement of expenses of Carroll County office.

Cross References. Nineteenth Judicial District, § 16-13-2701 et seq. and § 16-13-3001 et seq. [repealed]. For present law, see § 16-21-2401 et seq.

Effective Dates. Acts 1969, No. 71, §§ 2, 3; retroactive to Jan. 1, 1969. Emergency clause provided: "It has been ascertained and determined by the General Assembly of the State of Arkansas that on enactment of the General Assembly of the State of Arkansas, Act 304 of 1967, Section 6, a legal uncertainty as to contingent expense allowance of the prosecuting attorney for the newly created Nineteenth Judicial Circuit was created; that the contingent expense allowance of the prosecuting attorney of the Nineteenth Judicial Circuit is in equal amount of the total contingent expense allowance of the prosecuting attorney of the Fourth Judicial Circuit of which the Nineteenth Judicial Circuit was a part; that the stated contingent expense allowance is necessary to reimburse said prosecuting attorney for expenses incurred in the performance of his duties, and that the efficient operation of the courts and the administration of justice in the Nineteenth Judicial Circuit

has been jeopardized by this uncertainty as to the said expense allowance. Therefore, an emergency is hereby declared to exist and this Act being necessary for the immediate preservation of the public peace, health and safety, shall be in full force and effect from and after its passage and approval." Became law without Governor's signature, Feb. 19, 1969.

Acts 1983, No. 386, § 9: became law without Governor's signature, Mar. 10, 1983. Emergency clause provided: "It is hereby found and determined by the Seventy-Fourth General Assembly that because of the vagueness of Act 685 of 1979, legislation is immediately necessary to establish the financing of the prosecuting attorney's office for the 19th Judicial Circuit. The legislation is designed to allow the prosecuting attorney's office of the 19th Judicial Circuit to establish and operate at its current level and to provide for any future needs. Therefore, an emergency is hereby declared to exist, and this Act being immediately necessary for the preservation of the public peace, health and safety, shall be in full force and effect from and after its passage and approval."

16-21-2401. Contingent expense allowance.

(a) In lieu of any other contingent expense allowance now provided by law for the Prosecuting Attorney of the Nineteenth Judicial District, the prosecuting attorney shall hereafter receive a contingent expense allowance to be borne by the respective counties of the Nineteenth Judicial District as follows:

(1) Benton County \$1,750; and

(2) Carroll County \$750.

(b) The counties in the Nineteenth Judicial District shall pay the above prescribed annual amounts in equal monthly installments.

History. Acts 1969, No. 71, § 1; A.S.A. 1947, § 24-114.5.

16-21-2402. Reimbursement of expenses of Benton County office.

(a) The Quorum Court of Benton County shall furnish the Prosecuting Attorney of the Nineteenth Judicial District and his Benton County staff adequate office space in the Benton County Courthouse or, in lieu thereof, appropriate funds for the rental of office facilities and all expenses associated therewith.

(b) The Benton County Quorum Court shall appropriate adequate funds for reimbursing the prosecuting attorney for the actual expenses of the Benton County office, including, but not limited to, telephone, telegraph, postage, printing, office supplies and equipment, stationery, traveling expenses, and such other expenses which the quorum court may deem a proper expense of the prosecutor’s office.

History. Acts 1983, No. 386, § 6; A.S.A. 1947, § 24-114.14.

16-21-2403. Reimbursement of expenses of Carroll County office.

The Carroll County Quorum Court shall appropriate adequate funds for reimbursing the Prosecuting Attorney of the Nineteenth Judicial District for the actual expenses of the Carroll County office, including, but not limited to, telephone, telegraph, postage, printing, office supplies and equipment, stationery, traveling expenses, and such other expenses which the quorum court may deem a proper expense of the prosecutor’s office.

History. Acts 1983, No. 386, § 7; A.S.A. 1947, § 24-114.14a.

SUBCHAPTER 25 — TWENTIETH JUDICIAL DISTRICT

SECTION.
16-21-2501. Investigators.

Effective Dates. Acts 1999, No. 1238, § 5: Apr. 8, 1999. Emergency clause provided: “It is hereby found and determined by the Eighty-second General Assembly that this act is essential to the operation of the criminal justice system within the Twentieth (20th) Judicial District. It is

also hereby found and determined by the General Assembly that the prosecuting attorney for the Twentieth (20th) Judicial District is in need of these personnel in order to combat crime in the Twentieth (20th) Judicial District. Therefore, an emergency is declared to exist and this act

being immediately necessary for the preservation of the public peace, health and safety shall become effective on the date of its approval by the Governor. If the bill is neither approved nor vetoed by the Governor, it shall become effective on the

expiration of the period of time during which the Governor may veto the bill. If the bill is vetoed by the Governor and the veto is overridden, it shall become effective on the date the last house overrides the veto."

16-21-2501. Investigators.

(a) The Prosecuting Attorney of the Twentieth Judicial District is hereby authorized to appoint certified law enforcement officers as investigators for the prosecuting attorney's office.

(b) The investigators so appointed by the prosecuting attorney shall be classified as and have the same full power and authority as all other law enforcement officers in this state for purposes of retirement and for all other purposes.

History. Acts 1999, No. 1238, § 1.

SUBCHAPTER 26 — TWENTY-FIRST JUDICIAL DISTRICT

[Reserved]

A.C.R.C. Notes. Acts 1995, No. 1148, § 4, provided, in part: "Provided, however, that in the event that the district is separated into two districts or one county is removed from the district by state action, the shared time personnel currently funded by Sebastian County will be funded full time by Sebastian County. Provided further, that in the event that a Deputy within the district is selected to be interim Prosecutor said Deputy may take a leave of absence to fulfill this duty. Upon completion of said duty, the Deputy shall be entitled to return to either District's Prosecutor's Office with the consent of the Prosecuting Attorney at the level of funding that said Deputy would have been paid at had he not accepted the appointment duty. The Prosecutor of the Twelfth Circuit, at the request of the interim Prosecutor of the new District, may designate a Deputy to serve as the Deputy Prosecuting Attorney of the new District. In the

event that this procedure is followed, that Deputy shall be able to return to Sebastian County at the same pay as he is receiving at the time he is transferred back to Sebastian County from Crawford County at the end of the interim Prosecutor's term or any time before hand. For purposes of this Act, the new District shall be considered the one which is formed with Crawford County as a member county. Upon division, the prosecutor shall transfer all district equipment to Crawford County that is currently placed within the Crawford County Office at the time of the effective date of this Act and all equipment assigned to full time Crawford County personnel at the effective date of the separation Act."

Cross References. Composition, § 16-13-2901 et seq.

The Twenty-first Judicial District, § 16-21-152.

SUBCHAPTER 27 — TWENTY-SECOND JUDICIAL DISTRICT

SECTION.

16-21-2701. Investigators.

16-21-2701. Investigators.

(a) The Prosecuting Attorney of the Twenty-second Judicial District shall be entitled to appoint and employ one (1) investigator at not less than twenty-one thousand dollars (\$21,000), to be paid by Saline County when approved by the quorum court and payment is approved by the county judge.

(b) In addition to the investigator listed by salary in subsection (a) of this section, the Prosecuting Attorney of the Twenty-second Judicial District shall have the authority to appoint other investigators as necessary for the administration of justice who shall serve without pay.

(c)(1) All investigators authorized and so appointed shall have the authority to issue process, serve warrants, and possess all law enforcement officer powers.

(2) They shall be certified law enforcement officers commissioned by the Arkansas Commission on Law Enforcement Standards and Training and shall be defined as public safety members under Arkansas law.

(3) In the event that investigators shall issue process or serve warrants, the prosecutor's office shall be entitled to receive the same fee as provided in § 21-6-307, which shall be deposited into the hot check fees account.

History. Acts 1999, No. 1419, § 1.

CHAPTER 22

ATTORNEYS AT LAW

SUBCHAPTER.

1. GENERAL PROVISIONS.
2. ADMISSION AND PRACTICE.
3. RIGHTS AND LIABILITIES.
4. SUSPENSION AND DISBARMENT.
5. UNAUTHORIZED PRACTICE OF LAW.

RESEARCH REFERENCES

Am. Jur. 7 Am. Jur. 2d, Attys., § 1 et seq.

Ark. L. Rev. Arkansas' Judiciary: Its History and Structure, 18 Ark. L. Rev. 152.

Brill, The Arkansas Code of Judicial Conduct, 35 Ark. L. Rev. 247.

SUBCHAPTER 1 — GENERAL PROVISIONS

SECTION.

16-22-101. Lawyer referral services.

16-22-102. Delinquent noncustodial parents.

16-22-101. Lawyer referral services.

(a) It is unlawful for any person or organization to operate a lawyer referral service without prior approval of the Arkansas Supreme Court. "Lawyer referral service" means referring clients to attorneys and receiving compensation for the referral.

(b)(1) Any court of competent jurisdiction may order any person or organization violating this section to cease and desist from operating a lawyer referral service.

(2) Any person or entity failing to comply with the court order shall be deemed in contempt of court and subject to such punishment as prescribed by the court.

History. Acts 1991, No. 55, §§ 1, 2.

CASE NOTES

Cited: In re Arkansas Bar Ass'n, 323 Ark. 203, 913 S.W.2d 768 (1996).

16-22-102. Delinquent noncustodial parents.

The Office of Child Support Enforcement of the Revenue Division of the Department of Finance and Administration, upon reaching a cooperative agreement with the Arkansas Supreme Court, is hereby authorized to develop procedures under which the Clerk of the Supreme Court may each year furnish the Office of Child Support Enforcement with a list of those persons who possess a law license and the office shall notify the Clerk of the Supreme Court regarding a review of the law license whenever a noncustodial parent on the list is delinquent on a court-ordered child support payment or an adjudicated arrearage in an amount equal to six (6) months' obligation or more or is the subject of an outstanding failure to appear warrant, body attachment, or bench warrant pursuant to a child support order.

History. Acts 1993, No. 1253, § 1.

SUBCHAPTER 2 — ADMISSION AND PRACTICE

SECTION.

16-22-201. Qualifications for admission.

16-22-202. Examination required — Petition.

16-22-203. Board of examiners.

SECTION.

16-22-204. Authority of Justice or judge to license.

16-22-205. Oath.

16-22-206. Entitlement to practice.

SECTION.

- 16-22-207. Register of licensed attorneys.
 16-22-208. Barratry or maintenance —
 Disciplinary action by circuit and chancery courts.
 16-22-209. Practicing without license —
 Contempt of court.
 16-22-210. Clerk or sheriff not to act as attorney.

SECTION.

- 16-22-211. Corporations or associations
 — Practice of law or solicitation prohibited — Exceptions — Penalty.
 16-22-212. Disbarment in another state
 — Effects.
 16-22-213. Advertising.

Publisher's Notes. Some provisions of this subchapter may be superseded by the Arkansas Rules Governing Admission to the Bar.

Cross References. Regulating practice of law, Const., Amend. 28.

Effective Dates. Acts 1917, No. 361, § 3: effective on passage.

Acts 1917, No. 362, § 2: effective on passage.

Acts 1927, No. 199, § 2: effective on passage.

Acts 1929, No. 182, § 7: approved Mar. 23, 1929. Emergency clause provided: "This act being necessary for the immediate preservation of the public peace, health and safety, shall take effect and be in force from and after its passage."

Acts 1935, No. 168, § 5: approved Mar. 21, 1935. Emergency clause provided: "This act being necessary for the immediate preservation of the public peace,

health and safety, an emergency is hereby declared, and this act shall take effect and be in force from and its passage."

Acts 1958 (2nd Ex. Sess.), No. 11, § 2: Sept. 12, 1958. Emergency clause provided: "It has been found and declared by the General Assembly that the orderly administration of the educational facilities of Arkansas have been subjected to abuse by reason of the exemption granted them under the terms of Act 182, Ark. Acts of 1929, § 5 and it is to the public interest that our public schools be administered without such interference, and the passage of this act will tend to alleviate such a situation. Therefore, an emergency is declared to exist, and this act being necessary for the preservation of the public peace, health and safety, shall take effect and be in force from the date of its approval."

RESEARCH REFERENCES

ALR. Law student acting as counsel. 3 ALR 4th 358.

Failure to pay creditors affecting applicant's moral character for purposes of admission to the bar. 4 ALR 4th 436.

Solicitation of business by or for attorney. 5 ALR 4th 866.

Right of party mitigant to defend or counterclaim on ground that opposing party or his attorney is engaged in unauthorized practice of law. 7 ALR 4th 1146.

Lay person's assistance to party in divorce proceeding as unauthorized practice of law. 12 ALR 4th 656.

Reciprocity provisions for admission to bar. 14 ALR 4th 7.

Impersonations and other irresponsible conduct as bearing on moral character. 30 ALR 4th 1020.

Bar admission or reinstatement of attorney as affected by alcoholism or alcohol abuse. 39 ALR 4th 567.

Formal educational requirement for bar admission. 44 ALR 4th 910.

Am. Jur. 7 Am. Jur. 2d, Attys, § 12 et seq.

Ark. L. Rev. Legal Education in Arkansas, 16 Ark. L. Rev. 191.

Legal Profession — Aiding the Unauthorized Practice of Law, 17 Ark. L. Rev. 101.

C.J.S. 7 C.J.S., Atty & C., § 10 et seq.

16-22-201. Qualifications for admission.

(a) Every citizen of the age of twenty-one (21) years, of good moral character, and who possesses the requisite qualifications of learning and ability may, upon application and in the manner provided for in this subchapter, be admitted to practice as an attorney and counselor at law in the courts of this state.

(b) It shall be lawful for the Supreme Court to admit to practice as an attorney and counselor at law in the courts of this state any citizen under the age of twenty-one (21) years who is of good moral character and who possesses the other requisite qualifications of learning and ability, and who is a graduate of any accredited, recognized, or Class A law school.

History. Civil Code, § 760; Acts 1873, No. 88, § 1 [760], p. 213; 1917, No. 362, § 1, p. 1787; C. & M. Dig., § 596; Acts 1927, No. 199, § 1; Pope's Dig., § 633; A.S.A. 1947, § 25-101.

Cross References. Removal of disqualification for criminal offenses, § 17-1-103.

RESEARCH REFERENCES

UALR L.J. Sallings, Survey of Arkansas Law, 3 UALR L. J. 277.

CASE NOTES

Rules.

Authority of court in regulating the practice of law includes the preparation of rules determining and setting out the qualifications of one who desires to take

the bar examination. In re Pitchford, 265 Ark. 752, 581 S.W.2d 321 (1979), cert. denied, 444 U.S. 863, 100 S. Ct. 131, 62 L. Ed. 2d 85 (1979).

16-22-202. Examination required — Petition.

Every applicant for admission to practice law in the courts of this state shall be examined pursuant to rules of the Supreme Court of this state and shall, before his or her admission, produce to the court, by sworn petition, satisfactory proof of the qualifications found in § 16-22-201.

History. Civil Code, § 760; Acts 1873, No. 88, § 1 [760], p. 213; 1917, No. 361, § 1, p. 1786; C. & M. Dig., § 598; Acts 1929, No. 32, § 1; Pope's Dig., § 638; A.S.A. 1947, § 25-103.

Publisher's Notes. Acts 1917, No. 361,

§ 1, provided in part that the provisions of that act would not apply to any person to whom a license to practice law in any court of record in the state had theretofore been issued.

CASE NOTES

Cited: Feldman v. State Bd. of Law Exmrs., 438 F.2d 699 (8th Cir. 1971); Tay-

lor v. Safly, 276 Ark. 541, 637 S.W.2d 578 (1982).

16-22-203. Board of examiners.

The Supreme Court may appoint a board of examiners from practitioners in the Supreme Court for each judicial district to conduct the examinations for license, according to a standard adopted by the Supreme Court.

History. Acts 1917, No. 361, § 2, p. 1786; C. & M. Dig., § 599; Pope's Dig., § 639; A.S.A. 1947, § 25-104. certain persons from provisions of this section, see Publisher's Note to § 16-22-202.

Publisher's Notes. For exclusion of

16-22-204. Authority of Justice or judge to license.

No Justice of the Supreme Court or judge of the circuit or other court shall have power to license any applicant to practice law, but such power shall be exercised by the courts of this state, by proper orders, duly recorded.

History. Civil Code, § 760; Acts 1873, § 597; Pope's Dig., § 634; A.S.A. 1947, No. 88, § 1 [760], p. 213; C. & M. Dig., § 25-102.

16-22-205. Oath.

Any person admitted to practice law in this state shall make oath to support the Constitutions of the United States and of the State of Arkansas and to faithfully discharge the duties of the office upon which he is about to enter.

History. Civil Code, § 760; Acts 1873, No. 88, § 1 [760], p. 213; 1917, No. 361, § 1, p. 1786; C. & M. Dig., § 598; Acts 1929, No. 32, § 1; Pope's Dig., § 638; A.S.A. 1947, § 25-103.

Publisher's Notes. For exclusion of certain persons from provisions of this section, see Publisher's Note to § 16-22-202.

RESEARCH REFERENCES

UALR L.J. Wolfram, Lawyer Turf and Inherent-Powers Doctrine, 12 UALR L.J. Lawyer Regulation — The Role of the 1.

CASE NOTES

Cited: Feldman v. State Bd. of Law Exmrs., 438 F.2d 699 (8th Cir. 1971); Taylor v. Safly, 276 Ark. 541, 637 S.W.2d 578 (1982).

16-22-206. Entitlement to practice.

No person shall be licensed or permitted to practice law in any of the courts of record of this state until he has been admitted to practice by the Supreme Court of this state, and every person so admitted shall be entitled to practice in all the courts of this state.

History. Civil Code, § 760; Acts 1873, No. 88, § 1 [760], p. 213; 1917, No. 361, § 1, p. 1786; C. & M. Dig., § 598; Acts 1929, No. 32, § 1; Pope's Dig., § 638; A.S.A. 1947, § 25-103.

Publisher's Notes. For exclusion of certain persons from provisions of this section, see Publisher's Note to § 16-22-202.

CASE NOTES

ANALYSIS

In general.

License.

Pro se appearances.

In General.

Only the Supreme Court can license persons to practice law. *McGehee v. State*, 182 Ark. 603, 32 S.W.2d 308 (1930).

The court did not deny assistance of counsel to the plaintiff when it did not allow two non-attorneys to represent him in court. *Hooker v. Deere Credit Servs., Inc.*, 62 Ark. App. 293, 971 S.W.2d 267 (1998).

License.

It is illegal to practice law in Arkansas without a license. *All City Glass & Mirror*,

Inc. v. McGraw Hill Info. Sys. Co., 295 Ark. 520, 750 S.W.2d 395 (1988).

Pro Se Appearances.

Appellant, who appeared pro se, but tendered a motion on behalf of other appellants, is not a licensed attorney, may not practice law in Arkansas, and may not represent other appellants in this case. *Abel v. Kowalski*, 323 Ark. 201, 913 S.W.2d 788 (1996).

Cited: *Feldman v. State Bd. of Law Exmrs.*, 438 F.2d 699 (8th Cir. 1971); *Taylor v. Safly*, 276 Ark. 541, 637 S.W.2d 578 (1982).

16-22-207. Register of licensed attorneys.

It shall be the duty of the clerk of each court of record to keep a register in which he shall register and enroll every attorney or counselor at law licensed to practice in the court of which he is clerk.

History. Rev. Stat., ch. 15, § 6; C. & M. Dig., § 600; Pope's Dig., § 640; A.S.A. 1947, § 25-105.

Cross References. Fees of officers of the court, § 21-6-401 et seq.

16-22-208. Barratry or maintenance — Disciplinary action by circuit and chancery courts.

(a) Any person, not a member of the Bar of Arkansas, who shall commit or who shall conspire to commit any act defined by the law of this state to be barratry or maintenance, or who shall solicit for himself or for another person who is not a member of the Bar of Arkansas in any manner or by any method the handling of claims or litigation involving injuries to persons or damage to property, in such a manner as would constitute the practice of law, shall be deemed to have submitted himself to the personal jurisdiction of any circuit or chancery court having territorial jurisdiction of the county where the act was committed for disciplinary proceedings in the same manner as if he were a member of the Bar of Arkansas.

(b) In addition to any other lawful action the court might take in proceedings under this section, the court shall be authorized to enter an

injunction restraining the commission of any acts mentioned in subsection (a) of this section and may enforce the injunction with contempt proceedings as provided by law in other cases.

(c) It is declared to be the intent of this section to be in aid of and subordinate to the right of the Supreme Court of Arkansas to regulate and define the practice of law and prevent and prohibit the unauthorized or unlawful practice thereof by appropriate rules, orders, and penalties.

History. Acts 1961, No. 438, §§ 1-3; A.S.A. 1947, §§ 25-215 — 25-217.

RESEARCH REFERENCES

Ark. L. Rev. Note, Eaton and Benton v. Professional Conduct: Restrictions on Legal Advertising, 35 Ark. L. Rev. 549.
Supreme Court of Arkansas Committee on

CASE NOTES

Cited: Feldman v. State Bd. of Law Exmrs., 438 F.2d 699 (8th Cir. 1971); McKenzie v. Burris, 255 Ark. 330, 500 S.W.2d 357 (1973).

16-22-209. Practicing without license — Contempt of court.

Every person who shall attempt to practice law in any court of record without being licensed, sworn, and registered, as required in this subchapter, shall be deemed guilty of a contempt of court and shall be punished as in other cases of contempt.

History. Rev. Stat., ch. 15, § 7; C. & M. Dig., § 601; Pope's Dig., § 641; A.S.A. 1947, § 25-106.

CASE NOTES

ANALYSIS

Real estate brokers.
Scope of license.

Real Estate Brokers.

For a discussion of the unlawful practice of law by real estate brokers, see Arkansas Bar Ass'n v. Block, 230 Ark. 430, 323 S.W.2d 912, cert. denied, 361 U.S. 836, 80 S. Ct. 87, 4 L. Ed. 2d 76 (1959), modified, Creekmore v. Izard, 236 Ark. 558, 367 S.W.2d 419 (1963).

Scope of License.

Every attorney regularly licensed and duly admitted to practice in the courts of

this state possesses a license to appear in those courts for any suitors who may retain him; but his license is not of itself an authority to appear for any particular person until he is in fact employed or retained by him. Cartwell v. Menifee, 2 Ark. 356 (1840).

Cited: Tally v. Reynolds, 1 Ark. 99 (1838); Conway County v. Little Rock & F.S. Ry., 39 Ark. 50 (1882); Visart v. Bush, 46 Ark. 153 (1885).

16-22-210. Clerk or sheriff not to act as attorney.

No clerk of any court of record in this state or sheriff, while he continues to act as such, shall under any pretense whatever act as an attorney at law in the court of which he is clerk or in the county in which he is sheriff.

History. Rev. Stat., ch. 15, § 9; C. & M. Dig., § 602; Pope's Dig., § 642; A.S.A. 1947, § 25-107.

Cross References. Judges barred from practicing law, Ark. Const., Art. 7, § 25.

16-22-211. Corporations or associations — Practice of law or solicitation prohibited — Exceptions — Penalty.

(a) It shall be unlawful for any corporation or voluntary association to practice or appear as an attorney at law for any person in any court in this state or before any judicial body, to make it a business to practice as an attorney at law for any person in any of the courts, to hold itself out to the public as being entitled to practice law, to tender or furnish legal services or advice, to furnish attorneys or counsel, to render legal services of any kind in actions or proceedings of any nature or in any other way or manner, or in any other manner to assume to be entitled to practice law or to assume or advertise the title of lawyer or attorney, attorney at law, or equivalent terms in any language in such manner as to convey the impression that it is entitled to practice law, or to furnish legal advice, service, or counsel, or to advertise that either alone or together with or by or through any person, whether a duly and regularly admitted attorney at law or not, it has, owns, conducts, or maintains a law office or any office for the practice of law, or for furnishing legal advice, services, or counsel.

(b) It shall also be unlawful for any corporation or voluntary association to solicit itself by or through its officers, agents, or employees, any claim or demand for the purpose of bringing an action thereon or of representing as attorney at law or for furnishing legal advice, services, or counsel to, a person sued or about to be sued in any action or proceeding or against whom an action or proceeding has been or is about to be brought, or who may be affected by any action or proceeding which has been or may be instituted in any court or before any judicial body, or for the purpose of so representing any person in the pursuit of any civil remedy.

(c) The fact that any officer, trustee, director, agent, or employee shall be a duly and regularly admitted attorney at law shall not be held to permit or allow any such corporation or voluntary association to do the acts prohibited in this section nor shall that fact be a defense upon the trial of any of the persons mentioned for a violation of the provisions of this section.

(d) This section shall not apply to a corporation or voluntary association lawfully engaged in the examination and insuring of titles to real property, nor shall it prohibit a corporation or a voluntary association

from employing an attorney or attorneys in and about its own immediate affairs or in any litigation to which it is or may become a party.

(e) Nothing contained in this section shall be construed to prevent a corporation from furnishing to any person, lawfully engaged in the practice of law, such information or such clerical services in and about his professional work as, except for the provisions of this section, may be lawful, if at all times the lawyer receiving such information or such services shall maintain full professional and direct responsibility to his clients for the information and services so received. However, no corporation shall be permitted to render any services which cannot lawfully be rendered by a person not admitted to practice law in this state, nor to solicit directly or indirectly professional employment for a lawyer.

(f)(1) Any corporation or voluntary association violating any of the provisions of this section shall be guilty of a misdemeanor and punished by a fine of not less than one hundred dollars (\$100) nor more than five thousand dollars (\$5,000).

(2) Every officer, trustee, director, agent, or employee of the corporation or voluntary association who directly or indirectly engages in any of the acts prohibited in this section or assists such corporation or voluntary association to do such prohibited acts is guilty of a misdemeanor and shall be punished by a fine of not less than one hundred dollars (\$100) nor more than five thousand dollars (\$5,000).

History. Acts 1929, No. 182, §§ 1-6; Ex. Sess.), No. 11, § 1; A.S.A. 1947, §§ 25-205 — 25-210. Pope's Dig., §§ 3630-3635; Acts 1958 (2nd

RESEARCH REFERENCES

Ark. L. Notes. Laurence, Recent Developments in the Arkansas Law of Garnishment: Does a Corporate Garnishee Need a Lawyer to Answer the Writ?, 1997 Ark. L. Notes 95.

Ark. L. Rev. Legal Profession — Unauthorized Practice — Practice of Law by Banks, 9 Ark. L. Rev. 67.

Professional Corporations — A Current Appraisal, 23 Ark. L. Rev. 215.

CASE NOTES

ANALYSIS

Activities not prohibited.

Self-representation.

Unlawful practice.

Validity of instruments unlawfully prepared.

Activities Not Prohibited.

A banking corporation is not engaged in the unauthorized practice of law when it advertises its services as a fiduciary, recommends that the public consult with their attorneys, and does not attempt to perform legal services in general. A banking corporation, through its employee at-

torneys, is not engaged in the unauthorized practice of law when it compiles and drafts inventories and accounts in probate. *Arkansas Bar Ass'n v. Union Nat'l Bank*, 224 Ark. 48, 273 S.W.2d 408 (1954).

Self-Representation.

A banking corporation cannot practice law directly or indirectly through employee attorneys, except that it may represent itself in the courts through employee attorneys in its own business affairs. *Arkansas Bar Ass'n v. Union Nat'l Bank*, 224 Ark. 48, 273 S.W.2d 408 (1954).

Although individuals may represent themselves, corporations must be repre-

sented by licensed attorneys. *All City Glass & Mirror, Inc. v. McGraw Hill Info. Sys. Co.*, 295 Ark. 520, 750 S.W.2d 395 (1988).

Unlawful Practice.

A banking corporation, through its employee attorneys, is engaged in the unauthorized practice of law when its attorneys draft fiduciary instruments, prepare and file court papers, appear in court in pending litigation or to invoke processes for its beneficiaries, co-fiduciaries or others than the corporation, or advise persons other than the corporation as to legal matters. *Arkansas Bar Ass'n v. Union Nat'l Bank*, 224 Ark. 48, 273 S.W.2d 408 (1954).

Where abstract and title insurance companies draft and prepare for others instru-

ments involving real property and do title examination and curative work for others, they are engaged in the unauthorized practice of law. *Beach Abstract & Guar. Co. v. Bar Ass'n*, 230 Ark. 494, 326 S.W.2d 900 (1959).

Validity of Instruments Unlawfully Prepared.

Deed prepared by nonlawyer, who also gives advice as to its legal effect, is not void, although amounting to the unauthorized practice of law, since this section only penalizes the persons engaged in the unlawful practice. *Gaylor v. Gaylor*, 224 Ark. 644, 275 S.W.2d 644 (1955).

Cited: *Arkansas Bar Ass'n v. Union Nat'l Bank*, 224 Ark. 48, 273 S.W.2d 408 (1954).

16-22-212. Disbarment in another state — Effects.

(a) It shall be unlawful for any person to practice law or attempt to practice law, in any of the courts of record, municipal courts, justice courts, or any other court in this state, or to solicit business as, or in any manner represent himself to be, an attorney at law when such person so practicing or attempting to practice law, or soliciting business as, or representing himself to be, an attorney at law has previously been disbarred from the practice of law in any other state of the United States of America, while a resident of that state.

(b)(1) No person shall be admitted to practice law in this state who has been disbarred from the practice of law in any other state.

(2) The disbarment of any person from the practice of law in any other state shall operate as a disbarment of the person from the practice of law in this state under any license, permit, or enrollment issued to the person by any court in this state, prior to his disbarment in the other state.

(3) A certified copy of the order, judgment, or decree of the disbarment in the other state shall be prima facie evidence of the disbarment in the other state when filed in any court in this state.

(c) It shall be unlawful for any judge of any court of record, municipal judge, mayor, justice of the peace, or other magistrate to knowingly permit any person to practice law or attempt to practice law, or to appear in any manner as an attorney at law before him or in his court in violation of any of the terms and provisions of this section.

(d) Any person violating the terms of this section shall be guilty of a misdemeanor and upon conviction shall be fined in any sum not less than five hundred dollars (\$500) and not more than one thousand dollars (\$1,000). Each violation of this section shall constitute a separate offense.

History. Acts 1935, No. 168, §§ 1-4; Pope's Dig., §§ 633, 635-637; A.S.A. 1947, §§ 25-201 — 25-204.

Publisher's Notes. Acts 1935, No. 168, § 1, provided in part that the act would

not apply to any person who had been disbarred in another state and who had been reinstated in the state where the disbarment occurred prior to January 1, 1935.

16-22-213. Advertising.

(a) No attorney shall use the printed media or broadcast media, cable television, or any other medium to directly solicit clients or encourage litigation in this state. Attorneys may utilize the media and all other media for advertising their areas of practice or expertise, fees, addresses, telephone numbers, and as otherwise permitted by the Arkansas Supreme Court.

(b) Violations of this section shall constitute Class A misdemeanors.

History. Acts 1987, No. 317, §§ 1, 2.

RESEARCH REFERENCES

Ark. L. Rev. Killenbeck, Professionalism in the Balance?, 49 Ark. L. Rev. 671.

Schauer, The Speech of Law and the Law of Speech, 49 Ark. L. Rev. 687.

Rotunda, Professionalism, Legal Advertising, and Free Speech in the Wake of Florida Bar v. Went For It, Inc., 49 Ark. L. Rev. 703.

Watkins, Lawyer Advertising, the Elec-

tronic Media, and the First Amendment, 49 Ark. L. Rev. 739.

Florida Bar v. Went For It, Inc.: Does Ambulance-Chasing in Florida Justify Advertising Reform in Arkansas?, 49 Ark. L. Rev. 795.

UALR L.J. Survey — Attorneys, 10 UALR L.J. 539.

SUBCHAPTER 3 — RIGHTS AND LIABILITIES

SECTION.

16-22-301. Legislative intent.

16-22-302. Compensation governed by contract.

16-22-303. Compromise or settlement without attorney's consent — Effect.

16-22-304. Lien of attorney created.

16-22-305. Unnecessary costs satisfied by attorney.

16-22-306. Negligence of attorney resulting in dismissal — Liabil-

SECTION.

ity for costs and damages.

16-22-307. Failure to pay over money — Judgment for money and costs — Penalized by court.

16-22-308. Attorney's fees in certain civil actions.

16-22-309. Attorney's fees in actions lacking justiciable issue.

16-22-310. Liability for civil damages.

Publisher's Notes. Former §§ 16-22-301 — 16-22-304, concerning attorney liens, were repealed by Acts 1989, No. 293, § 3. They were derived from the following sources:

16-22-301. Acts 1941, No. 59, § 1; 1941, No. 306, § 1; A.S.A. 1947, § 25-301.

16-22-302. Acts 1941, No. 59, § 1; 1941, No. 306, § 1; A.S.A. 1947, § 25-301.

16-22-303. Acts 1941, No. 59, § 1; 1941, No. 306, § 1; A.S.A. 1947, § 25-301.

16-22-304. Acts 1909, No. 293, § 2, p. 892; C. & M. Dig., § 629; Pope's Dig., § 669; Acts 1983, No. 755, § 1; A.S.A. 1947, § 25-302.

Cross References. Attorney's fees, award of in refund action brought under Ark. Const., Art. 16, § 13, § 26-35-902.

Volunteers, liability for negligence in rendering legal services, § 16-6-104.

Effective Dates. Acts 1915, No. 240, § 3: approved Mar. 24, 1915. Emergency declared.

Acts 1987, No. 661, § 5: Apr. 6, 1987. Emergency clause provided: "It is hereby found and determined by the General Assembly that the liability of accountants and attorneys to persons not in privity of contract with them should be specifically outlined by legislative enactment; that this Act establishes the limits of such liability; and that this Act should go into effect as soon as possible. Therefore, an emergency is hereby declared to exist and this Act being immediately necessary for the preservation of the public peace, health and safety shall be in full force and effect from and after its passage and approval."

Acts 1989, No. 293, § 4: Mar. 2, 1989. Emergency clause provided: "It is hereby

found and determined by the General Assembly of the State of Arkansas that the Supreme Court in *Henry, Walden and Davis v. Goodman*, 294 Ark. 25 (1987), limited the existing Attorney's Lien Law by allowing only a quantum meruit recovery in a case in which the attorney was dismissed by the client; that the Supreme Court's interpretation of the Attorney Lien Law is contrary to what was intended by the enactment of Acts 59 and 306 of 1941, the Attorney Lien Law; that an attorney should have the right to rely on his contract with his client; and that the Attorney's Lien Law should be reenacted to protect the contractual rights of attorneys. Therefore, an emergency is hereby declared to exist and this Act being necessary for the preservation of the public peace, health and safety shall be in full force and effect from and after its passage and approval."

RESEARCH REFERENCES

ALR. State statute or court rule fixing maximum fees for attorney appointed to represent indigent. 3 ALR 4th 576.

Attorney's death as affecting compensation under contingent fee contract. 9 ALR 4th 191.

Charging excessive fee as ground for disciplinary action. 11 ALR 4th 133.

Statute establishing contingent fee scale for attorneys representing parties in medical malpractice actions. 12 ALR 4th 23.

Statute or rule providing for arbitration of fee disputes between attorneys and their clients. 17 ALR 4th 993.

Attorney's charging lien as including services rendered or disbursements made in other than instant action or proceeding. 23 ALR 4th 336.

Referral fee agreement between attorneys. 28 ALR 4th 665.

"Structured settlement" and attorney's

fees arrangements in relation thereto. 31 ALR 4th 95.

Priority between judgment creditor's lien and attorney's lien. 34 ALR 4th 665.

Retaining lien as affected by action to collect legal fees. 45 ALR 4th 198.

Am. Jur. 7 Am. Jur. 2d, Attys, § 183 et seq., § 357 et seq.

Ark. L. Rev. Legal Profession — Non-Compromise Provisions in Attorney-Client Contracts, 3 Ark. L. Rev. 474.

Attorney-Client — Compensation of Attorney as Condition Precedent to Substitution, 13 Ark. L. Rev. 140.

Legal Malpractice, 27 Ark. L. Rev. 452.

Note, *Henry, Walden & Davis v. Goodman: The Value of a Discharged Attorney's Contingent Fee Contract in Arkansas*, 42 Ark. L. Rev. 549.

UALR L.J. Survey, Legal Profession, 12 UALR L.J. 649.

C.J.S. 7 C.J.S., Att'y & C., § 131 et seq.

CASE NOTES

ANALYSIS

Applicability.
Scope.

Applicability.

The statutory lien provided in this subchapter is available to attorneys who have been dismissed only if they have been

fired without cause. *Crockett & Brown v. Wilson*, 314 Ark. 578, 864 S.W.2d 244 (1993).

Scope.

Act 293 of 1989, codified as § 16-22-301 et seq., explicitly provides that attorneys may rely on their contractual rights with clients and are entitled to obtain a lien for services based on such agreements. The Attorneys Lien Law also provides that,

under appropriate circumstances, the lien may be enforced not only against the client but against anyone, including another attorney, who knowingly settles with an opposing litigant without the consent of the attorney, and being remedial legislation, Act 293 is not confined to prospective operation. *Lockley v. Easley*, 302 Ark. 13, 786 S.W.2d 573 (1990).

16-22-301. Legislative intent.

It is hereby found and determined by the General Assembly of the State of Arkansas that the Supreme Court, in *Henry, Walden, and Davis v. Goodman*, 294 Ark. 25 (1987), limited the existing Attorney's Lien Law by allowing only a quantum meruit recovery in a case in which the attorney was dismissed by the client; that the Supreme Court's interpretation of the Attorney Lien Law is contrary to what was intended by the enactment of Acts 59 and 306 of 1941, the Attorney Lien Law; that an attorney should have the right to rely on his contract with his client; and that the Attorney's Lien Law should be reenacted to protect the contractual rights of attorneys. Therefore, it is the intent of §§ 16-22-302 — 16-22-304 to allow an attorney to obtain a lien for services based on his or her agreement with his or her client and to provide for compensation in case of a settlement or compromise without the consent of the attorney.

History. Acts 1989, No. 293, § 1.

Publisher's Notes. As to repeal of former provisions relating to lien of attor-

ney, see Publisher's Notes to this subchapter.

RESEARCH REFERENCES

Ark. L. Notes. Brill, Equity and the Restitutionary Remedies: Constructive Trust, Equitable Lien, and Subrogation, 1992 Ark. L. Notes 1.

UALR L.J. Survey—Miscellaneous, 11 UALR L.J. 235.

CASE NOTES

Applicability.

The attorney's lien statutes, this section through § 16-22-304, do not apply to cases in which an attorney is terminated for cause. *Williams v. Ashley*, 319 Ark. 197, 890 S.W.2d 260 (1995).

An attorney's lien extends only to fees and disbursements rendered in the particular action in which they were incurred, and does not cover a general balance due the attorney, charges rendered in other

causes, or charges in causes not intimately connected with the particular action. *Grayson v. Bank of Little Rock*, 334 Ark. 180, 971 S.W.2d 788 (1998).

Cited: *Lockley v. Easley*, 302 Ark. 13, 786 S.W.2d 573 (1990); *Haskins Law Firm v. American Nat'l Property & Cas. Co.*, 304 Ark. 684, 804 S.W.2d 714 (1991); *Lancaster v. Fitzhugh*, 310 Ark. 590, 839 S.W.2d 192 (1992); *Finnegan v. Johnson*, 326 Ark. 586, 932 S.W.2d 344 (1996).

16-22-302. Compensation governed by contract.

The compensation of an attorney at law, solicitor, or counselor for his services is governed by agreement, expressed or implied, which is not restrained by law.

History. Acts 1989, No. 293, § 1.

Publisher's Notes. As to repeal of former provisions relating to lien of attor-

ney, see Publisher's Notes to this subchapter.

RESEARCH REFERENCES

UALR L.J. Survey—Miscellaneous, 11
UALR L.J. 235.

CASE NOTES**ANALYSIS**

Construction.
Applicability.
Compliance.
Contingency fees.
Contract.
Discharge for cause.
Discharge without cause.

Construction.

Former similar section was remedial in character and was to be liberally construed. *Slayton v. Russ*, 205 Ark. 474, 169 S.W.2d 571 (1943); *Monsanto Chem. Co. v. Grandbush*, 162 F. Supp. 797 (W.D. Ark. 1958) (preceding decisions under prior law).

Applicability.

The attorney's lien statutes, §§ 16-22-301 — 16-22-304, do not apply to cases in which an attorney is terminated for cause. *Williams v. Ashley*, 319 Ark. 197, 890 S.W.2d 260 (1995).

Compliance.

Strict compliance with the statute is not required, substantial compliance will suffice. *Gary Eubanks & Assocs. v. Black & White Cab Co.*, 34 Ark. App. 235, 808 S.W.2d 796 (1991).

Attorney failed to comply with this section where the letter did not contain notice of intent to assert an attorney's lien on the proceeds of the claim, the letter was not dispatched by registered mail, and did not contain the signature of attorney or client. *Gary Eubanks & Assocs. v. Black & White Cab Co.*, 34 Ark. App. 235, 808 S.W.2d 796 (1991).

Contingency Fees.

Contingency contracts for legal services are valid and enforceable, and when those services have been performed as contemplated in contract, attorney is entitled to fee fixed in the contract and to lien granted by attorney's lien provisions. Former statute did not authorize an attorney to recover full contingency fee under contract where contract had not been fully performed, and attorney was limited to recovery of a reasonable fee for his services. *Henry, Walden & Davis v. Goodman*, 294 Ark. 25, 741 S.W.2d 233 (1987) (decision under prior law).

Contract.

There was no requirement under former statute that a contract for the compensation of attorney be in writing. *Equifax, Inc. v. Luster*, 463 F. Supp. 352 (E.D. Ark. 1978), *aff'd sub nom. Arkansas La. Gas Co. v. Luster*, 604 F.2d 31 (8th Cir. 1979) (decision under prior law).

Discharge for Cause.

An attorney discharged for cause is entitled only to a "reasonable fee" rather than a contract fee. *Crockett & Brown v. Wilson*, 314 Ark. 578, 864 S.W.2d 244 (1993).

Where attorney was discharged for cause, this section was not applicable, and the chancellor properly awarded a reasonable fee for attorney's services rendered to the date of termination, rather than at the contracted rate. *Williams v. Ashley*, 319 Ark. 197, 890 S.W.2d 260 (1995).

Discharge Without Cause.

Where an attorney was retained to represent an heir in the settlement of an

estate upon an agreement that he should receive a certain percentage of the heir's interest in the estate and was discharged without cause before the estate was settled and suit was brought at once, he was entitled to recover his expenses and the value of his services but not to recover the amount of compensation agreed upon, as

the amount that would be due under the contract could not be ascertained until the estate was settled. *Weil v. Finneran*, 70 Ark. 509, 69 S.W. 310 (1902) (decision under prior law).

Cited: *Lancaster v. Fitzhugh*, 310 Ark. 590, 839 S.W.2d 192 (1992).

16-22-303. Compromise or settlement without attorney's consent — Effect.

(a) Any agreement, contract, or arrangement between litigants or any conduct of the one seeking affirmative relief at the instance and procurement of his adversary which deprives the litigant of his asserted right against his adversary shall constitute a compromise or settlement of his cause of action within the meaning of this section.

(b)(1) In case a compromise or settlement is made by the parties litigant to the action after service of the notice by certified mail and before the filing of suit, or if made after suit is filed upon the action and such compromise or settlement is made without the consent of such attorney at law, solicitor, or counselor, the court of proper jurisdiction shall, upon motion, enter judgment for a reasonable fee or compensation against all of the parties to the compromise or settlement so made without the consent of the attorney at law, solicitor, or counselor, and the amount of the fee or compensation shall not be necessarily limited to the amount, if any, of the compromise or settlement between the parties litigant.

(2) If the compromise or settlement is effected by an agent or agents of such party, the judgment shall be entered against the agent or agents as well as against those parties from whom the attorney at law, solicitor, or counselor is entitled to judgment for the fee or compensation, and, if the compromise or settlement is made with the knowledge or advice of the attorney at law, solicitor, or counselor of those parties from whom the attorney at law, solicitor, or counselor is entitled to judgment for the fee or compensation, the court shall also enter judgment against such attorneys at law, solicitors, or counselors as well.

History. Acts 1989, No. 293, § 1.

Publisher's Notes. As to repeal of former provisions relating to lien of attor-

ney, see Publisher's Notes to this subchapter.

RESEARCH REFERENCES

UALR L.J. Survey—Miscellaneous, 11
UALR L.J. 235.

CASE NOTES

ANALYSIS

Construction.
Applicability.
Abandonment of client.
Collection of fee.
—Lien.
Entitlement to fee.
Motion to fix fee.
Reasonableness of fee.

Construction.

Former similar section was remedial in character and must be liberally construed. *Slayton v. Russ*, 205 Ark. 474, 169 S.W.2d 571 (1943); *Monsanto Chem. Co. v. Grandbush*, 162 F. Supp. 797 (W.D. Ark. 1958) (preceding decisions under prior law).

Applicability.

The attorney's lien statutes, §§ 16-22-301 — 16-22-304, do not apply to cases in which an attorney is terminated for cause. *Williams v. Ashley*, 319 Ark. 197, 890 S.W.2d 260 (1995).

Abandonment of Client.

Counsel's protest to client and advice against making what he thought was an improvident settlement did not constitute abandonment of his client or forfeiture of any right he may have had under contract with client. *St. Louis-San Francisco Ry. v. Hurst*, 198 Ark. 546, 129 S.W.2d 970 (1933) (decision under prior law).

Collection of Fee.

The right of the attorney to collect his fee from his client's adversary is dependent upon this section and he must bring his case in conformity therewith. *Missouri Pac. Transp. Co. v. Geurin*, 200 Ark. 755, 140 S.W.2d 691 (1940) (decision under prior law).

Where client settles claim without attorney's knowledge, attorney can recover fee by separate action in the court in which his client's action was instituted and is not limited to file a motion in the original suit. *Missouri Pac. Transp. Co. v. McDonald*, 206 Ark. 270, 174 S.W.2d 944 (1943) (decision under prior law).

Judgment for a reasonable fee may be against any of the parties litigant. *Henry, Walden & Davis v. Goodman*, 294 Ark. 25, 741 S.W.2d 233 (1987) (decision under prior law).

—Lien.

Probate court had jurisdiction to enforce attorney's lien pending in that court for case tried before that court. *Baxter Land Co. v. Gibson*, 236 Ark. 664, 367 S.W.2d 741 (1963) (decision under prior law).

If a proceeding to collect attorney's fee is against the client, the amount of the fee is to be governed by their agreement and, to ensure payment of that fee, the attorney is entitled to a lien upon the client's cause of action which attaches to any settlement recovered by the client; however, when the attorney proceeds against the other party, this section contains no provision for a lien upon the cause of action which might attach to a settlement recovered by the other party and the attorney is entitled only to a reasonable fee or compensation. *Jarboe v. Hicks*, 281 Ark. 21, 660 S.W.2d 930 (1983); *Cato v. Arkansas Mun. League Mun. Health Benefit Fund*, 285 Ark. 419, 688 S.W.2d 720 (1985) (preceding decisions under prior law).

Where attorney filed suit for accounting and aided in preparing divorce suit, which was dismissed, and there was no showing that client received tangible assets in return for the dismissal of her claim, no useful purpose would be served by reopening suit for purposes of enforcing attorney's lien. *Myers v. Muuss*, 281 Ark. 188, 662 S.W.2d 805 (1984) (decision under prior law).

Entitlement to Fee.

Defendant, by compromising and settling with client, recognizes the attorney's absolute right to recover a fee of some amount and the attorney is entitled to a recovery without having to prove that client could recover in the original case. *Slayton v. Russ*, 205 Ark. 474, 169 S.W.2d 571 (1943) (decision under prior law).

When a client settles a claim without the attorney's consent, with or without a monetary consideration for the settlement, the attorney is nevertheless entitled to a reasonable fee. *Missouri Pac. Transp. Co. v. McDonald*, 206 Ark. 270, 174 S.W.2d 944 (1943) (decision under prior law).

Attorney who, when it developed at the trial that client's suit had been settled without his knowledge, entered a nonsuit, did not lose his right to an attorney's fee.

Missouri Pac. Transp. Co. v. McDonald, 206 Ark. 270, 174 S.W.2d 944 (1943) (decision under prior law).

In suit by attorneys to recover fees where parties to a suit have compromised, attorneys need not show that suit would have been successful, if tried, or that client received any consideration for the compromise or settlement. *Hamm v. Howard*, 216 Ark. 326, 225 S.W.2d 333 (1949) (decision under prior law).

Attorney was entitled to fee for services rendered in suing debtor where debtor paid client directly, if client had agreed to pay attorney a reasonable cash fee for any services performed. *Stevens v. Gilliam*, 220 Ark. 867, 251 S.W.2d 241 (1952) (decision under prior law).

To be entitled to a fee under this section the attorney does not have to show that the suit would have been successful. *Monsanto Chem. Co. v. Grandbush*, 162 F. Supp. 797 (W.D. Ark. 1958) (decision under prior law).

An attorney discharged with or without cause can recover the reasonable value of his or her services to the date of discharge. *Crockett & Brown, P.A. v. Courson*, 312 Ark. 363, 849 S.W.2d 938 (1993).

Motion to Fix Fee.

Proof of a compromise or settlement after suit is filed and without the attorney's consent constitutes, under this section, the only prerequisite to the proper filing by the attorney of a motion to have his fee fixed. *Slayton v. Russ*, 205 Ark. 474, 169 S.W.2d 571 (1943) (decision under prior law).

Reasonableness of Fee.

This section provides for a fee on a quantum meruit basis and in determining what would be a reasonable fee, court takes into consideration the amount of time and labor involved, the skill and ability of the attorney, and the nature and extent of the litigation. *St. Louis-San Francisco Ry. v. Hurst*, 198 Ark. 546, 129 S.W.2d 970 (1939) (decision under prior law).

Fee is not necessarily limited to the amount of the settlement; other elements may be considered in determining a reasonable fee on a quantum meruit. *Missouri Pac. Transp. Co. v. Geurin*, 200 Ark. 755, 140 S.W.2d 691 (1940) (decision under prior law).

For discussion of reasonableness of fee in various contexts, see *St. Louis S.W. Ry. v. Poe*, 201 Ark. 93, 143 S.W.2d 879 (1940); *Slayton v. Russ*, 205 Ark. 474, 169 S.W.2d 571 (1942); *Holland v. Harley*, 206 Ark. 244, 174 S.W.2d 567 (1943); *Missouri Pac. Transp. Co. v. McDonald*, 206 Ark. 270, 174 S.W.2d 944 (1943); *Equifax, Inc. v. Luster*, 463 F. Supp. 352 (E.D. Ark. 1978) (decisions under prior law).

Among the pertinent considerations in determining the reasonableness of an attorney's fee, not specifically fixed by contract, are: (1) the attorney's judgment, learning, ability, skill, experience, professional standing and advice; (2) the relationship between the parties; (3) the amount or importance of the subject matter of the case; (4) the nature, extent and difficulty of services in research; (5) the preparation of pleadings; (6) the proceedings actually taken and the nature and extent of the litigation; (7) the time and labor devoted to the client's cause, the difficulties presented in the course of the litigation and the results obtained. In making these determinations, both the trial court's and the appellate court's experience and knowledge of the character of such services may be used as a guide. *Crockett & Brown, P.A. v. Courson*, 312 Ark. 363, 849 S.W.2d 938 (1993).

Fee award held reasonable. *Crockett & Brown, P.A. v. Courson*, 312 Ark. 363, 849 S.W.2d 938 (1993).

There is no requirement that the trial judge consider his own experience and knowledge in assessing the reasonableness of a fee. *Harper v. Shackelford*, 41 Ark. App. 116, 850 S.W.2d 15 (1993).

Cited: *Haskins Law Firm v. American Nat'l Property & Cas. Co.*, 304 Ark. 684, 804 S.W.2d 714 (1991).

16-22-304. Lien of attorney created.

(a)(1) From and after service upon the adverse party of a written notice signed by the client and by the attorney at law, solicitor, or counselor representing the client, which notice is to be served by certified mail, a return receipt being required to establish actual delivery of the notice, the attorney at law, solicitor, or counselor serving the notice upon the adversary party shall have a lien upon his client's cause of action, claim, or counterclaim, which attaches to any settlement, verdict, report, decision, judgment, or final order in his client's favor, and the proceeds thereof in whosoever's hands they may come.

(2) The lien cannot be defeated and impaired by any subsequent negotiation or compromise by any parties litigant.

(3) However, the lien shall apply only to the cause or causes of action specifically enumerated in the notice.

(b) In the event that the notice is not served upon the adverse party by an attorney at law, solicitor, or counselor representing his client, the same lien created in this section shall attach in favor of the attorney at law, solicitor, or counselor from and after the commencement of an action or special proceeding or the service upon an answer containing a counterclaim, in favor of the attorney at law, solicitor, or counselor who appears for and signs a pleading for his client in the action, claim, or counterclaim in which the attorney at law, solicitor, or counselor has been employed to represent the client.

(c) This lien shall apply to proceedings before the Workers' Compensation Commission. The lien shall attach from the date a notice of claim is filed with the commission, if served by certified mail, return receipt requested, or from the date the commission mails notice of the claim to the employer or carrier, regardless of whether this mailing by the commission is by certified mail or regular mail, whichever date occurs first.

(d) The court or commission before which an action was instituted, or in which an action may be pending at the time of settlement, compromise, or verdict, or in any chancery court of proper venue, upon the petition of the client or attorney at law, shall determine and enforce the lien created by this section.

History. Acts 1989, No. 293, § 1; 1991, No. 1229, § 1. former section, see Publisher's Notes to this subchapter.

Publisher's Notes. As to repeal of

CASE NOTES**ANALYSIS**

Constitutionality.
In general.
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Purpose.
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Appeal.

· Collection of fee.
—Lien.
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Jurisdiction.
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Procedure for enforcement.
Property subject to lien.
Reasonable fees.
Reopening suit.
Settlement.
Time of attachment.

Constitutionality.

Former statute did not unconstitutionally deprive one of the right of trial by jury, since constitutional right of trial by jury applies only to rights that existed at common law before the adoption of the constitution, and does not apply to new rights created by the legislature since the adoption of the constitution. *Henry, Walden & Davis v. Goodman*, 294 Ark. 25, 741 S.W.2d 233 (1987) (decision under prior law).

In General.

Former similar statute provided the only method by which an attorney's lien could be enforced. *McNeill v. Percy*, 201 Ark. 454, 145 S.W.2d 32 (1940) (decision under prior law).

An attorney's lien which has attached to the proceeds of litigation follows the property when it is conveyed to others. *Nash v. Estate of Swaffar*, 336 Ark. 235, 983 S.W.2d 942 (1999).

Construction.

Former statute was remedial in character and was to be liberally construed. *Slayton v. Russ*, 205 Ark. 474, 169 S.W.2d 571 (1943); *Monsanto Chem. Co. v. Grandbush*, 162 F. Supp. 797 (W.D. Ark. 1958); *Rush v. Metrocentre Imp. Dist. No. 1*, 686 F.2d 625 (8th Cir. 1982) (preceding decisions under prior law).

Purpose.

Purpose of former statute was to establish a lien for attorney's fees, after specified notice to adverse parties, which attached to proceeds of any settlement, verdict, report, decision, judgment, or final order. *Henry, Walden & Davis v. Goodman*, 294 Ark. 25, 741 S.W.2d 233 (1987) (decision under prior law).

The 1989 amendments to the Attorney's Lien Law expressed a clear legislative intent that attorneys be allowed to rely on the contracts they make with their clients, regardless of whether the contract is for a contingent fee or otherwise. *Lancaster v. Fitzhugh*, 310 Ark. 590, 839 S.W.2d 192 (1992).

Applicability.

The attorney's lien statutes, § 16-22-301 through this section, do not apply to cases in which an attorney is terminated for cause. *Williams v. Ashley*, 319 Ark. 197, 890 S.W.2d 260 (1995).

Appeal.

Where, upon appeal from suit in which appellants intervened, appellants filed an affidavit to the effect that they had not authorized an appeal, appeal was dismissed without prejudice to rights of counsel to pursue any action or lien which he may have had for services. *Martin v. Pope*, 226 Ark. 522, 290 S.W.2d 849 (1956) (decision under prior law).

Collection of Fee.

The right of the attorney to collect his fee from his client's adversary was dependent upon former statute and he had to bring his case in conformity therewith. *Missouri Pac. Transp. Co. v. Geurin*, 200 Ark. 755, 140 S.W.2d 691 (1940) (decision under prior law).

Where client settles claim without attorney's knowledge, attorney can recover fee by separate action in the court in which his client's action was instituted and is not limited to file a motion in the original suit. *Missouri Pac. Transp. Co. v. McDonald*, 206 Ark. 270, 174 S.W.2d 944 (1943) (decision under prior law).

—Lien.

Probate court had jurisdiction to enforce attorney's lien pending in that court for case tried before that court. *Baxter Land Co. v. Gibson*, 236 Ark. 664, 367 S.W.2d 741 (1963) (decision under prior law).

If a proceeding to collect attorney's fees is against the client, the amount of the fee is to be governed by their agreement and, to ensure payment of that fee, the attorney is entitled to a lien upon the client's cause of action which attaches to any settlement recovered by the client; however, when the attorney proceeds against the other party, former statute contained no provision for a lien upon the cause of action which might attach to a settlement recovered by the other party and the attorney was entitled only to a reasonable fee or compensation. *Jarboe v. Hicks*, 281 Ark. 21, 660 S.W.2d 930 (1983); *Cato v. Arkansas Mun. League Mun. Health Benefit Fund*, 285 Ark. 419, 688 S.W.2d 720

(1985) (preceding decisions under prior law).

Where attorney filed suit for accounting and aided in preparing divorce suit, which was dismissed, and there was no showing that client received tangible assets in return for the dismissal of her claim, no useful purpose would be served by reopening suit for purposes of enforcing attorney's lien. *Myers v. Muuss*, 281 Ark. 188, 662 S.W.2d 805 (1984) (decision under prior law).

Where the client did not receive a verdict in his favor in the interpleader action, and did not receive any portion of the interpled fund, no judgment existed on which his attorney could attach a lien. *Birdsong Cabinet Shop, Inc. v. Bland*, 307 Ark. 149, 817 S.W.2d 886 (1991).

The circuit court erred in making the particular declaration allowing attorney a 20% interest in client's potential recovery against the disputed trust and estate. The circuit court should have considered a declaration of whether or not the attorney was entitled to a fee based on quantum meruit. *Lancaster v. Fitzhugh*, 310 Ark. 590, 839 S.W.2d 192 (1992).

Contingency Fee.

Where legal services had been fully performed as contemplated in a contingency fee contract, attorney was entitled to the fee fixed in the contract and to the lien granted by former statute. Former statute did not authorize an attorney to recover full contingency fee under contract where contract had not been fully performed, and attorney was limited to recovery of a reasonable fee for his services. *Henry, Walden & Davis v. Goodman*, 294 Ark. 25, 741 S.W.2d 233 (1987) (decision under prior law). But see § 16-22-301.

Expenses.

Where client agreed to pay attorney one-third of amount recovered and, out of his share, any expenses properly incurred, expenses properly incurred were a part of the fee and within the purview of former statute. Moreover, compensation of assisting attorney should have been considered as one of expenses properly incurred and embraced in the attorney's lien. *McNeill v. Percy*, 201 Ark. 454, 145 S.W.2d 32 (1940) (decision under prior law).

The lien for an attorney's fee also includes the expenses properly incurred by

the attorney in prosecuting the suit. *Monsanto Chem. Co. v. Grandbush*, 162 F. Supp. 797 (W.D. Ark. 1958); *Equifax, Inc. v. Luster*, 463 F. Supp. 352 (E.D. Ark. 1978), *aff'd sub nom. Arkansas La. Gas Co. v. Luster*, 604 F.2d 31 (8th Cir. 1979) (preceding decisions under prior law).

Interpleader.

Attorneys who contracted on a contingent fee basis to bring action against insurance companies for fire loss were entitled to fee based on total recovery even though a percentage of the amount would actually be paid to mortgagee in interpleader action, and attorneys were entitled to lien for that amount on mortgagor's portion of recovery. *Consolidated Underwriters of S.C. Ins. Co. v. Bradshaw*, 136 F. Supp. 395 (W.D. Ark. 1955) (decision under prior law).

Jurisdiction.

The lien must be enforced in the trial court. *May v. Ausley*, 103 Ark. 306, 146 S.W. 139 (1912) (decision under prior law).

Probate court had jurisdiction to enforce attorney's lien pending in that court for case tried before that court. *Baxter Land Co. v. Gibson*, 236 Ark. 664, 367 S.W.2d 741 (1963) (decision under prior law).

Even though petitioner argued that venue was improper under § 16-60-116(a) because he neither resided nor was summoned in Crawford County, but because the complaint was one quasi in rem to determine the rights to the money in the registry of the Crawford County Circuit Court and, specifically, his rights to attorney fees, Crawford County was the proper venue for hearing the complaint in intervention under subsection (d) of this section. *Milligan v. Circuit Court*, 331 Ark. 439, 959 S.W.2d 747 (1998).

Notice.

In suit to recover fee from adverse party, attorney should allege and prove that defendant had notice of his interest in the suit. *Kansas City, Ft. S. & M.R.R. v. Joslin*, 74 Ark. 551, 86 S.W. 435 (1905); *Rachels & Robinson v. Doniphan Lumber Co.*, 98 Ark. 529, 136 S.W. 658 (1911) (preceding decisions under prior law).

A letter to the adverse party from the attorney, even though not signed by his client, that he was impressing a lien constituted substantial compliance with former statute. *Metropolitan Life Ins. Co.*

v. Roberts, 241 Ark. 994, 411 S.W.2d 299 (1967) (decision under prior law).

Attorney not entitled to relief under this section where attorney failed to comply with this section's requirement of written notice signed by the client. *Childs v. Mid-Century Ins. Co.*, 55 Ark. App. 168, 934 S.W.2d 533 (1996).

Priority.

Attorney's lien on judgment which was garnished by third party was held superior to garnishment, even though service of garnishment antedated attorney's petition to establish lien, because the lien attached and dated from the filing of the complaint and the issuance of summons thereon. *McNeill v. Percy*, 201 Ark. 454, 145 S.W.2d 32 (1940) (decision under prior law).

In action by mortgagor against insurance companies for fire loss, attorney's lien attached when complaints were filed and summons issued thereon and were superior to liens of mortgagor's creditors, including lien of judgment creditor under § 16-66-112, where judgment creditor had not obtained execution or garnishment against personal property or delivery of the writ to the officer in the proper county. *Consolidated Underwriters of S.C. Ins. Co. v. Bradshaw*, 136 F. Supp. 395 (W.D. Ark. 1955) (decision under prior law).

Mortgagee's right to the proceeds of fire policy containing open loss payable and standard mortgage clauses was superior to lien of attorneys who represented mortgagor in action to recover on policy. *Consolidated Underwriters of S.C. Ins. Co. v. Bradshaw*, 136 F. Supp. 395 (W.D. Ark. 1955) (decision under prior law).

Procedure for Enforcement.

Where client settles claim without attorney's knowledge, attorney can recover fee by separate action in the court in which his client's action was instituted and is not limited to file a motion in the original suit. *Missouri Pac. Transp. Co. v. McDonald*, 206 Ark. 270, 174 S.W.2d 944 (1943) (decision under prior law).

The procedure for enforcing an attorney's lien may be by motion in court where action is pending, or may be by separate suit in that court. *Monsanto Chem. Co. v. Grandbush*, 162 F. Supp. 797 (W.D. Ark. 1958) (decision under prior law).

Where suit began as a contract action in

which the circuit court had proper subject matter jurisdiction, after the suit was amended to include a request for declaratory relief, the suit was still properly before the circuit court, as §§ 16-111-103 and 16-111-104 permit courts of record within their respective jurisdictions to declare relief in cases involving the interpretation of contracts. *Lancaster v. Fitzhugh*, 310 Ark. 590, 839 S.W.2d 192 (1992).

Property Subject to Lien.

A solicitor has no lien upon his client's land for services rendered in removing a cloud from his title to it. *Hershy v. Du Val*, 47 Ark. 86, 14 S.W. 469 (1885) (decision under prior law).

Attorney is not entitled to lien on land allotted to client in partition suit. *Gibson v. Buckner*, 65 Ark. 84, 44 S.W. 1034 (1898); *Weatherford v. Hill*, 68 Ark. 80, 56 S.W. 448 (1900); *Haupt v. Bohl*, 71 Ark. 330, 75 S.W. 470 (1903) (preceding decisions under prior law).

Former statute did not give the attorney any interest in, or control over, the cause of action; he had a lien only on the fruits of the litigation. *Saint Louis, I.M. & S. Ry. v. Blaylock*, 117 Ark. 504, 175 S.W. 1170 (1915) (decision under prior law).

An interest of one of the parties in certain oil leases was not subject to attorney's lien. *Monsanto Chem. Co. v. Grandbush*, 162 F. Supp. 797 (W.D. Ark. 1958) (decision under prior law).

Reasonable Fees.

Although former statute made no distinction between a contingency fee and a fee based on other criteria, it did not require that the fee should be anything other than reasonable. *Henry, Walden & Davis v. Goodman*, 294 Ark. 25, 741 S.W.2d 233 (1987) (decision under prior law).

Reopening Suit.

Where attorney filed suit for accounting and aided in preparing divorce suit, which was dismissed, and there was no showing that client received tangible assets in return for the dismissal of her claim, no useful purpose would be served by reopening suit for purposes of enforcing attorney's lien. *Myers v. Muuss*, 281 Ark. 188, 662 S.W.2d 805 (1984).

Settlement.

The right of an attorney to his fees is unaffected by a release executed by his

client, relieving the defendant from liability. *American Nat'l Ins. Co. v. Mooney*, 111 Ark. 514, 164 S.W. 276 (1914) (decision under prior law).

Attempted compromise by one of distributees of proceeds of judicial sale, absent authority by other distributees, did not bind other distributees or defeat the contingent fee interest of their attorney. *Holland v. Wait*, 193 Ark. 1179, 102 S.W.2d 550 (1937) (decision under prior law).

Where an attorney, employed by finance company to collect balance due or repossess car from delinquent purchaser, called on defendant and received his promise to pay balance or deliver car on following day, and the attorney neither filed suit nor gave defendant a written notice by registered mail, and defendant made compromise settlement directly with finance company, the attorney had no right of action or lien against defendant for attorneys fees under former statute. *Whetstone v. Daniel*, 217 Ark. 899, 233 S.W.2d 625 (1950) (decision under prior law).

Where debtor of attorney's client settled with client without attorney's knowledge after registered letter had been sent to debtor informing him that client had instructed attorney to file suit on the account, attorney acquired statutory lien and was entitled to a reasonable fee from debtor for his services. *Whetstone v. Travis*, 223 Ark. 856, 269 S.W.2d 320 (1954) (decision under prior law).

A client's action in settling or dismissing his claim or cause of action without consulting his attorney could also entitle the latter to a lien for his fee under former statute. *Martin v. Pope*, 226 Ark. 522, 290 S.W.2d 849 (1956) (decision under prior law).

A client could dismiss or settle his cause of action without consulting his attorney, but if he does so, the attorney had a lien for his fee under former statute. *Monsanto Chem. Co. v. Grandbush*, 162 F. Supp. 797 (W.D. Ark. 1958) (decision under prior law).

Where a general contractor and an insurance company resolved claims between them by entering into a comprehensive settlement agreement which decreased the monetary obligations owed by the gen-

eral contractor to the insurer, the agreement was a settlement in the general contractor's favor within the meaning of former statute and, therefore, the general contractor's attorney had a valid and enforceable lien which had attached to the settlement sum. *Rush v. Metrocentre Imp. Dist. No. 1*, 686 F.2d 625 (8th Cir. 1982) (decision under prior law).

By the language of the attorney's lien statute, the lien applies to "any settlement"; thus, where a law firm, that had agreed to represent a client for a contingent fee and later was fired, claimed an attorney's lien on behalf of its former client against any recovery, but entered into an express contract with the client's new attorney for a guaranteed attorney's lien for a specific dollar amount, the law firm bargained away its right to any future recovery by substituting a liquidated sum in exchange for surrendering its right to a percentage of any subsequent recovery. *Haskins Law Firm v. American Nat'l Property & Cas. Co.*, 304 Ark. 684, 804 S.W.2d 714 (1991).

Time of Attachment.

Lien attaches when summons is issued. *Union Sawmill Co. v. Pace, Campbell & Davis*, 163 Ark. 598, 260 S.W. 428 (1924) (decision under prior law).

Attorney employed under written contract had a lien on client's cause of action from the date the complaint was filed and summons issued thereon. *McNeill v. Percy*, 201 Ark. 454, 145 S.W.2d 32 (1940) (decision under prior law).

In an action under former statute against an insurance company, the cause of action attached upon the happening of total and permanent disability, although not recoverable until due proof of disability was made, and the fact that notice was given prior to the furnishing of proof of disability would not defeat the lien. *Metropolitan Life Ins. Co. v. Roberts*, 241 Ark. 994, 411 S.W.2d 299 (1967) (decision under prior law).

When an attorney fails to give the required written notice to the adverse party, a lien does not attach until summons, issued on the complaint, is placed in the hands of the proper sheriff. *Home Ins. Co. v. Jones*, 253 Ark. 218, 485 S.W.2d 190 (1972) (decision under prior law).

16-22-305. Unnecessary costs satisfied by attorney.

If any attorney at law or other person admitted to conduct causes in any court in the State of Arkansas appears to have multiplied the proceedings in any cause before such court, so as to increase costs unreasonably and vexatiously, he shall be required, by order of the court, to satisfy any excess of costs so increased.

History. Acts 1915, No. 240, § 2; C. & M. Dig., § 607; Pope's Dig., § 647; A.S.A. 1947, § 25-303.

Cross References. Liability of attorney for costs, §§ 16-68-306, 16-68-407.

16-22-306. Negligence of attorney resulting in dismissal — Liability for costs and damages.

If any suit in any court of record in this state is dismissed on account of the negligence of any attorney at law, or for his nonattendance at the court without having a just and reasonable excuse for such absence, it shall be at the costs of the attorney at law. Such attorney at law shall be liable for all damages his client may have sustained by the dismissal or by any other neglect by the attorney at law of his duty, in an action in any court within this state having jurisdiction thereof.

History. Rev. Stat., ch. 15, § 10; C. & M. Dig., § 608; Pope's Dig., § 648; A.S.A. 1947, § 25-304.

CASE NOTES**ANALYSIS**

Good faith.
Negligence.

Good Faith.

In dealing with their clients, attorneys are required to exercise the utmost good faith. *Weil v. Fineran*, 78 Ark. 87, 93 S.W. 568 (1906).

Negligence.

An attorney is not liable in the discharge of his official duty for claims put

into his hands to collect as an attorney, unless it is shown that he has been guilty of culpable negligence in the prosecution of his suit, and thereby the plaintiff has lost his debt. *Cummins v. McLain*, 2 Ark. 402 (1840); *Sevier v. Holliday*, 2 Ark. 512 (1840); *Palmer & Southmayd v. Ashley & Ringo*, 3 Ark. 75 (1840).

Cited: *Barr v. Cockrill*, 224 Ark. 570, 275 S.W.2d 6 (1955).

16-22-307. Failure to pay over money — Judgment for money and costs — Penalized by court.

If any attorney at law receiving money for his client refuses or fails to pay the money over on demand, the attorney at law may be proceeded against in a summary way on motion before the circuit court, either in the county in which he may reside or in the county in which he received the money. The court shall render judgment against him for the amount of money received by the attorney at law for the use of his client, with costs, and he shall be further dealt with as the court may deem just under the provisions of this subchapter.

History. Rev. Stat., ch. 15, § 11; C. & M. Dig., § 609; Pope's Dig., § 649; A.S.A. 1947, § 25-305.

Cross References. Judgment on motion obtained by client against attorney, § 16-65-201.

CASE NOTES

ANALYSIS

Basis of liability.
Notice of collection.
Summary proceedings.
Suspension from practice.
Wrongful payment.

Basis of Liability.

An attorney cannot be held liable for money collected by him as such, unless a demand is made upon him and he refuses to pay it over or remit it according to instructions of his client. His liability depends upon the principle of agency, and he holds money when collected as bailee. *Taylor v. Spears*, 6 Ark. 381 (1846).

Notice of Collection.

It is the duty of an attorney who has collected money as such to give notice of the fact to his client within a reasonable time, and if he fails to do so he may be sued without previous demand. *Jett v. Hempstead*, 25 Ark. 462 (1869).

If the client has notice, he must make demand in a reasonable time. *Whitehead v. Wells*, 29 Ark. 99 (1874).

Summary Proceedings.

This section was not intended as a substitute for an ordinary action for money had and received, and where the attorney files a verified answer showing a meritorious defense, the court cannot render summary judgment upon the client's motion. *Davies & Davies v. Patterson*, 132 Ark. 484, 201 S.W. 504 (1917).

Suspension from Practice.

A complaint charging an attorney with failure to pay over client's funds, asking that the court deal with him as the court might deem just, is sufficient to base an order suspending defendant from practice. *Nichols v. Little*, 112 Ark. 213, 165 S.W. 301 (1914).

Wrongful Payment.

If an attorney, without authority, pays money of his client to another, who was not authorized to receive it, the client may recover it from the attorney. *Wood & Henderson v. Claiborne*, 82 Ark. 514, 102 S.W. 219 (1907).

Cited: *Wallis v. State*, 54 Ark. 611, 16 S.W. 821 (1891).

16-22-308. Attorney's fees in certain civil actions.

In any civil action to recover on an open account, statement of account, account stated, promissory note, bill, negotiable instrument, or contract relating to the purchase or sale of goods, wares, or merchandise, or for labor or services, or breach of contract, unless otherwise provided by law or the contract which is the subject matter of the action, the prevailing party may be allowed a reasonable attorney's fee to be assessed by the court and collected as costs.

History. Acts 1987, No. 519, § 1; 1989, No. 800, § 1.

Publisher's Notes. Acts 1999, No. 135, § 5, provided: "All laws and parts of laws in conflict with this Act are hereby repealed. Specifically, any other law or parts of law of general application regarding the award of attorneys' fees, as applied in litigation involving policies of insurance, are superseded by this Act. Specifically,

the provisions of § 16-22-308 regarding the award of attorneys' fees to the prevailing party in a civil action for breach of contract are expressly superseded by the provisions of this Act." Acts 1999, No. 135 amended § 23-79-208.

Cross References. Actions on bonds, notes, etc., § 16-107-101 et seq.

Costs generally, § 16-68-401 et seq.

RESEARCH REFERENCES

Ark. L. Rev. Note, Crockett and Brown, P.A. v. Courson: Determining the Fee of an Attorney Discharged "For Cause," 47 Ark. L. Rev. 725.

UALR L.J. Survey — Attorneys, 10 UALR L.J. 539.

Survey — Miscellaneous, 12 UALR L.J. 219.

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Construction.
Applicability.
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— Procedure.
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Teachers.
Time limitations.
Tort action.

Construction.

This section covers the same subject as § 23-89-207 and aids in determining legislative intent for that section. Wenrick v. Crater, 315 Ark. 361, 868 S.W.2d 60 (1993).

The legislature's use of the word "may" in this section indicates that the legislature intended a court's award of attorney's fees pursuant to this section to be permissive and discretionary with the court rather than mandatory. Reliance Ins. Co. v. Tobl Eng'g, Inc., 735 F. Supp. 326 (W.D. Ark. 1990).

Applicability.

Statutes such as this section providing for attorney's fees to be taxed as costs are to be given retrospective application. City of Fayetteville v. Bibb, 30 Ark. App. 31, 781 S.W.2d 493 (1989).

This section, defining costs as including discretionary attorney's fees in certain cases, must be applied by federal court in a diversity case. Reliance Ins. Co. v. Tobl Eng'g, Inc., 735 F. Supp. 326 (W.D. Ark. 1990).

Plaintiff was not entitled to attorney's fees where he brought an action to recover on a materialman's lien, unjust enrichment and detrimental reliance and not on any of the instruments or contracts expressly listed in this section, and where plaintiff obtained only partial relief on its detrimental reliance claim and could not be said to have prevailed on its unjust enrichment claim. Westside Galvanizing Servs., Inc. v. Georgia-Pacific Corp., 921 F.2d 735 (8th Cir. 1990), reh'g denied.

This statute allows a trial court to assess a reasonable attorney's fee and is inapplicable upon appeal. University Hosp. v. Undernehr, 307 Ark. 445, 821 S.W.2d 26 (1991); 215 Club v. Devore, 311 Ark. 309, 843 S.W.2d 317 (1992); Precision Steel Whse., Inc. v. Anderson-Martin Mach. Co., 313 Ark. 258, 854 S.W.2d 321 (1993).

This section does not embrace tort actions such as deceit. Stein v. Lukas, 308 Ark. 74, 823 S.W.2d 832 (1992).

An attorney discharged with or without cause can recover the reasonable value of his or her services to the date of discharge. Crockett & Brown, P.A. v. Courson, 312 Ark. 363, 849 S.W.2d 938 (1993).

This section does not provide for a reasonable attorney's fee in tort actions. Mercedes-Benz Credit Corp. v. Morgan, 312 Ark. 225, 850 S.W.2d 297 (1993).

While this section allows for attorney's fees in breach of contract cases, it does not allow attorney's fees in tort actions. Security Pac. Hous. Servs., Inc. v. Friddle, 315 Ark. 178, 866 S.W.2d 375 (1993).

A written agreement, specifically providing for the payment of attorney's fees incurred, is enforceable in accordance with its terms, and is independent of the statutory authorization providing for attorney's fees under the circumstances covered by this section. Griffin v. First Nat'l Bank, 318 Ark. 848, 888 S.W.2d 306 (1994).

This section is a general statute provid-

ing for the recovery of attorney's fees in actions on breach of contract, and a general statute does not apply where there is a specific statute covering a particular subject matter. *State Farm Mut. Auto. Ins. Co. v. Brown*, 48 Ark. App. 136, 892 S.W.2d 519 (1995).

As this section does not mention insurance policies or provide for attorney's fees for either insureds or insurers, it does not allow an award of attorney's fees to a prevailing insurer in an action seeking recovery for a claim under a policy. *Village Mkt., Inc. v. State Farm Gen. Ins. Co.*, 334 Ark. 227, 975 S.W.2d 86 (1998).

Attorney's Duty.

The burden of obtaining a ruling from the trial court is on the attorney requesting fees; any objections and matters left unresolved below are waived and may not be raised on appeal. *Crockett & Brown, P.A. v. Courson*, 312 Ark. 363, 849 S.W.2d 938 (1993).

Bankruptcy.

A creditor's status as unsecured does not bar it from asserting a claim in bankruptcy court for attorney's fees under this section. In *re Hunter*, 203 Bankr. 150 (Bankr. W.D. Ark. 1996).

Breach of Contract.

Although the supreme court held in *O'Bar v. Hight*, 169 Ark. 1008, 277 S.W. 533 (1925), that a covenantee could not recover attorney's fees from the covenantor in an action for breach of warranty, Act 800 of 1989 amended this section to permit a trial court to allow a reasonable attorney's fee to the prevailing party in an action for breach of contract. *Murchie v. Hinton*, 41 Ark. App. 84, 848 S.W.2d 436 (1993).

A warranty deed should be considered a contract between a grantor and his grantee who has accepted it for the purposes of this section. *Murchie v. Hinton*, 41 Ark. App. 84, 848 S.W.2d 436 (1993).

Since an implied-in-law contract, or quasi-contract, is indeed no contract at all, there was no authority for an award of attorneys' fees. *Friends of Children, Inc. v. Marcus*, 46 Ark. App. 57, 876 S.W.2d 603 (1994).

Where defendant prevailed against plaintiff's allegations that they breached their lease terms, the trial court was authorized to award reasonable attorney's

fees under this section. *Sunbelt Exploration Co. v. Stephens Prod. Co.*, 320 Ark. 298, 896 S.W.2d 867 (1995).

The circuit court was authorized to award attorneys' fees not subject to a specified limit where the plaintiff's action was for breach of contract. *Marshall Sch. Dist. v. Hill*, 56 Ark. App. 134, 939 S.W.2d 319 (1997).

It was too late for the plaintiff to attempt to recharacterize her suit as one for breach of contract in order to trigger an attorney's fee award under this section where she previously characterized the suit as one for illegal exaction and entered into a settlement which provided for attorney's fees under § 26-35-902(a), which authorizes attorney's fees in illegal exaction cases. *Barnhart v. City of Fayetteville*, 335 Ark. 57, 977 S.W.2d 225 (1998).

Computation of Fees.

Although there is no fixed formula in determining the computation of attorney's fees, the courts should be guided by recognized factors in making their decision, including the experience and ability of the attorney, the time and labor required to perform the legal service properly, the amount involved in the case and the results obtained, the novelty and difficulty of the issues involved, the fee customarily charged in the locality for similar legal services, whether the fee is fixed or contingent, the time limitations imposed upon the client or by the circumstances, and the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer. *Chrisco v. Sun Indus., Inc.*, 304 Ark. 227, 800 S.W.2d 717 (1990).

Among the pertinent considerations in determining the reasonableness of an attorney's fee, not specifically fixed by contract, are: (1) the attorney's judgment, learning, ability, skill, experience, professional standing and advice; (2) the relationship between the parties; (3) the amount or importance of the subject matter of the case; (4) the nature, extent and difficulty of services in research; (5) the preparation of pleadings; (6) the proceedings actually taken and the nature and extent of the litigation; (7) the time and labor devoted to the client's cause, the difficulties presented in the course of the litigation and the results obtained. In

making these determinations, both the trial court's and the appellate court's experience and knowledge of the character of such services may be used as a guide. *Crockett & Brown, P.A. v. Courson*, 312 Ark. 363, 849 S.W.2d 938 (1993).

There is no requirement that the trial judge consider his own experience and knowledge in assessing the reasonableness of a fee. *Harper v. Shackelford*, 41 Ark. App. 116, 850 S.W.2d 15 (1993).

Any attorney's fees awarded should be reasonable; there are established principles which a court should use in determining the reasonableness of an attorney's fee and, among others, these should include consideration of whether or not the actions taken by a party seeking such fees were meritorious and successful. *Griffin v. First Nat'l Bank*, 318 Ark. 848, 888 S.W.2d 306 (1994).

—Procedure.

Trial court's decision concerning entitlement to fees under this section required an inquiry separate from its decision on the merits of the underlying action — an inquiry which could not commence until party prevailed in the underlying action. *Marsh & McLennan v. Herget*, 321 Ark. 180, 900 S.W.2d 195 (1995).

Court's Authority.

A trial court may not award an attorney's fee for services performed by an attorney on appeal after the case in which the fee is sought has been returned to the trial court by a mandate which does not order the fee. *National Cashflow Sys. v. Race*, 307 Ark. 131, 817 S.W.2d 876 (1991).

Where the additional award of costs on appeal was not awarded at the direction of the appellate court, was not of a ministerial nature, and was for the services of the prevailing party's attorney on appeal, the trial court was without authority to award attorney fees following the appeal. *Race v. National Cashflow Sys.*, 34 Ark. App. 261, 810 S.W.2d 46, aff'd, 307 Ark. 131, 817 S.W.2d 876 (1991).

Discretion of Court.

The word "may" is usually employed as implying permissive or discretionary, rather than mandatory, action or conduct and is construed in a permissive sense unless necessary to give effect to an intent to which it is used; and within the context in which the word "may" is employed in

this section, allowance of attorney's fees is permissive and discretionary with the trial court. *Chrisco v. Sun Indus., Inc.*, 304 Ark. 227, 800 S.W.2d 717 (1990).

This section is clearly not mandatory and the decision whether to award attorney fees in cases governed by this section is left to the sound discretion of the trial court. *Logue v. Seven-Hot Springs Corp.*, 926 F.2d 722 (8th Cir. 1991).

While this section allows for the award of attorney's fees in certain civil actions, including actions for breach of contract, the decision whether to award a fee in such cases is a decision within the trial court's discretion. *Security Pac. Hous. Servs., Inc. v. Friddle*, 315 Ark. 178, 866 S.W.2d 375 (1993).

Since the award of attorney's fees is discretionary under this section, and since neither party cited authority or presented argument indicating that the trial court abused its discretion, there was no abuse of discretion in denying attorney's fees pursuant to this section. *Caplener v. Bluebonnet Milling Co.*, 322 Ark. 751, 911 S.W.2d 586 (1995).

Election of Remedies.

The policy concern supporting the election doctrine (which operates to preclude a complainant from receiving an award that over-compensates and over-restores him for his injury by permitting recovery on two different theories) is not a valid consideration with respect to a fee request. *Childs v. Adams*, 322 Ark. 424, 909 S.W.2d 641 (1995).

Evidence.

The failure of an attorney to keep detailed time records is not fatal to his claim. *Harper v. Shackelford*, 41 Ark. App. 116, 850 S.W.2d 15 (1993).

Fees Allowed.

Where plaintiff was awarded relief for failure to promote and back pay, the recovery he received was pay for labor or services and recovery could be had for attorney's fees. *City of Ft. Smith v. Driggers*, 305 Ark. 409, 808 S.W.2d 748 (1991).

As the holding of the trial court was that there was an employment contract which was breached, the awarding of an attorney's fee was not improper. *Crain Indus., Inc. v. Cass*, 305 Ark. 566, 810 S.W.2d 910 (1991).

Fee award held reasonable. *Crockett & Brown, P.A. v. Courson*, 312 Ark. 363, 849 S.W.2d 938 (1993).

Appellees, guarantors, pursuant to contract and this section, awarded reasonable attorney's fees. *Arkansas Indus. Dev. Comm'n v. FABCO of Ashdown, Inc.*, 312 Ark. 26, 847 S.W.2d 13 (1993).

Fees Denied.

The trial court erred in awarding attorney's fees in an interpleader action. *Construction Mach. v. Roberts*, 307 Ark. 252, 819 S.W.2d 268 (1991).

Costs for depositions, expert fees and travel expenses are not allowable. *Sunbelt Exploration Co. v. Stephens Prod. Co.*, 320 Ark. 298, 896 S.W.2d 867 (1995).

An appeal from a decision of the Civil Service Commission is an action which does not fall within the language of this section and therefore attorney's fees are not authorized. *City of Little Rock v. Quinn*, 35 Ark. App. 77, 811 S.W.2d 6 (1991).

Where the contract for or purchase of materials was made by previous owners and the suit was a suit in rem against the property, the only recovery that could be made by the plaintiff was under the section that grants a lien against the property for materials and labor furnished, § 18-44-101, which does not provide that the supplier of the materials or labor has a lien for attorney's fees, so that attorney's fees were not recoverable. *Transportation Properties, Inc. v. Central Glass & Mirror of N.W. Ark., Inc.*, 38 Ark. App. 60, 827 S.W.2d 667 (1992).

Award of attorney's fees was reversed where the plaintiff's action was based primarily in tort. *Meyer v. Riverdale Harbor Mun. Property Owners Imp. Dist. No. 1*, 58 Ark. App. 91, 947 S.W.2d 20 (1997).

Prevailing Party.

Where six of the seven counts contained in plaintiff's complaint were dismissed on defendant's motion for directed verdict at the close of plaintiff's case-in-chief and jury returned a verdict in favor of plaintiff on remaining count, plaintiff was the "prevailing party" under this section. *ERC Mtg. Group, Inc. v. Luper*, 32 Ark. App. 19, 795 S.W.2d 362 (1990).

Even though defendant was simply defending the cause of action on the basis that no contract existed between the par-

ties, defendant was a prevailing party within the meaning of the statute and entitled to attorney's fees. *Cumberland Fin. Group, Ltd. v. Brown Chem. Co.*, 34 Ark. App. 269, 810 S.W.2d 49 (1991).

Although the original request for fees was based on claims dismissed before trial, the district court did not abuse its discretion in awarding the prevailing parties their attorney's fees under this section. *TCBY Sys. v. RSP Co.*, 33 F.3d 925 (8th Cir. 1994).

The chancellor did not abuse her discretion in awarding attorney's fees to the party she determined to be the prevailing party in a breach of contract action. *Gill v. Transcriptions, Inc.*, 319 Ark. 485, 892 S.W.2d 258 (1995).

A third-party beneficiary may recover attorney's fees under this section. *Little Rock Wastewater Util. v. Larry Moyer Trucking, Inc.*, 321 Ark. 303, 902 S.W.2d 760 (1995).

Reversal of Judgment.

Where trial court relied on this section in authorizing award of attorney's fees to the prevailing party, the Supreme Court, in reversing judgment, also reversed the award of attorney's fees. *Brookside Village Mobile Homes v. Meyers*, 301 Ark. 139, 782 S.W.2d 365 (1990).

Since the judgment in favor of the prevailing party was reversed, the award of the attorney's fee was also reversed. *American States Ins. Co. v. Tri Tech, Inc.*, 35 Ark. App. 134, 812 S.W.2d 490 (1991).

Standard of Review.

Due to the trial judge's intimate acquaintance with the record and the quality of service rendered, the appellate court usually recognizes the superior perspective of the trial judge in assessing the applicable factors. Accordingly, an award of attorney's fees will not be set aside absent an abuse of discretion by the trial court. *Chrisco v. Sun Indus., Inc.*, 304 Ark. 227, 800 S.W.2d 717 (1990).

Teachers.

An action brought pursuant to the Teacher Fair Dismissal Act, § 6-17-1501 et seq., is both a civil action and a claim for labor or services, and thus covered by this section. *Junction City Sch. Dist. v. Alphin*, 56 Ark. App. 61, 938 S.W.2d 239 (1997); *Hall v. Kingsland Sch. Dist.*, 56 Ark. App. 110, 938 S.W.2d 571 (1997).

Actions brought pursuant to the Teacher Fair Dismissal Act of 1983, § 6-17-1501 et seq., are actions in contract for labor or services such that attorney's fees may be awarded by the trial court pursuant to this section. *Love v. Smackover Sch. Dist.*, 329 Ark. 4, 946 S.W.2d 676 (1997).

Time Limitations.

There is no statute or local court rule that prescribes any specific time limit on a motion for an attorney's fee under this section. Therefore, because the essence of waiver is the voluntary relinquishment of a known right, it was impossible to waive right to request a fee award under this section by filing motion more than 30 days after the underlying judgment was rendered. *Marsh & McLennan v. Herget*, 321 Ark. 180, 900 S.W.2d 195 (1995).

Tort Action.

When the prevailing party's claim is based in tort, an award of attorney's fees cannot be justified under this section. *Wheeler Motor Co. v. Roth*, 315 Ark. 318, 867 S.W.2d 446 (1993).

Where a case was submitted to the jury on alternate theories, both contract and tort, and the jury based its award on the tort theory, the trial judge did not err in declining to award attorney's fees. *Wheeler Motor Co. v. Roth*, 315 Ark. 318, 867 S.W.2d 446 (1993).

Attorney's fees denied where the action was one for replevin and, alternatively, for conversion of two trucks; this section does not allow attorney's fees in tort actions. *McQuillan v. Mercedes-Benz Credit Corp.*, 331 Ark. 242, 961 S.W.2d 729 (1998).

Cited: *Damron v. University Estates, Phase II, Inc.*, 295 Ark. 533, 750 S.W.2d 402 (1988); *Meyers Gen. Agency v. Laverder*, 301 Ark. 503, 785 S.W.2d 28 (1990); *Lockley v. Easley*, 302 Ark. 13, 786 S.W.2d 573 (1990); *Eddings v. Lippe*, 304 Ark. 309, 802 S.W.2d 139 (1991); *Woodhaven Homes, Inc. v. Kennedy Sheet Metal Co.*, 304 Ark. 415, 803 S.W.2d 508 (1991); *McElroy v. Grisham*, 306 Ark. 4, 810 S.W.2d 933 (1991); *Green v. Bell*, 308 Ark. 473, 826 S.W.2d 226 (1992); *Loewer v. National Bank*, 311 Ark. 354, 844 S.W.2d 329 (1992); *P.A.M. Transp., Inc. v. Arkansas Blue Cross & Blue Shield*, 315 Ark. 234, 868 S.W.2d 33 (1993), *supp. op.*, 315 Ark. 250-A, — S.W.2d — (1994); *Hardison v. Jackson*, 45 Ark. App. 49, 871 S.W.2d 410 (1994); *Mason v. Jackson*, 323 Ark. 252, 914 S.W.2d 728 (1996); *City of Ozark v. Nichols*, 56 Ark. App. 85, 937 S.W.2d 686 (1997); *Nettleton Sch. Dist. v. Owens*, 329 Ark. 367, 948 S.W.2d 94 (1997); *Milligan v. Circuit Court*, 331 Ark. 439, 959 S.W.2d 747 (1998); *Arkansas Okla. Gas Corp. v. Waelder Oil & Gas, Inc.*, 332 Ark. 548, 966 S.W.2d 259 (1998).

16-22-309. Attorney's fees in actions lacking justiciable issue.

(a)(1) In any civil action in which the court having jurisdiction finds that there was a complete absence of a justiciable issue of either law or fact raised by the losing party or his attorney, the court shall award an attorney's fee in an amount not to exceed five thousand dollars (\$5,000), or ten percent (10%) of the amount in controversy, whichever is less, to the prevailing party unless a voluntary dismissal is filed or the pleadings are amended as to any nonjusticiable issue within a reasonable time after the attorney or party filing the dismissal or the amended pleadings knew, or reasonably should have known, that he would not prevail.

(2) This section shall not apply to actions arising out of a written instrument or agreement which entitles the prevailing party to an award of reasonable attorney's fees.

(b) In order to find an action, claim, setoff, counterclaim, or defense to be lacking a justiciable issue of law or fact, the court must find that the action, claim, setoff, counterclaim, or defense was commenced, used, or continued in bad faith solely for purposes of harassing or maliciously injuring another or delaying adjudication without just cause or that the

party or the party's attorney knew, or should have known, that the action, claim, setoff, counterclaim, or defense was without any reasonable basis in law or equity and could not be supported by a good faith argument for an extension, modification, or reversal of existing law.

(c) In awarding attorney's fees, the court may pronounce its decision on the fees at the conclusion of the trial or special proceedings without written motion and with or without presentation of additional evidence. The judgment for attorney's fees, if any, shall be included in the final judgment entered in the action.

(d) On appeal, the question as to whether there was a complete absence of a justiciable issue shall be determined de novo on the record of the trial court alone.

History. Acts 1987, No. 601, §§ 1-5.

RESEARCH REFERENCES

UALR L.J. Survey — Attorneys, 10
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Summary judgment.

Applicability.

Although the filing of the petition may not have triggered the application of this section, the continuation of the suit beyond a reasonable time after this section became effective rendered the litigant subject to its terms. *Ward v. Davis*, 298 Ark. 48, 765 S.W.2d 5 (1989).

Burden of Proof.

This section is not applicable to appellate courts. *Mosley Mach. Co. v. Gray Supply Co.*, 310 Ark. 448, 837 S.W.2d 462 (1992).

Subsection (c) makes it clear that it applies in trial rather than appellate courts and thus furnishes no authority for an award of fees requested for the first time on appeal. *Cowan v. Schmidle*, 312 Ark. 256, 848 S.W.2d 421 (1993).

Where it was obvious from the parties'

arguments, the trial court's thorough opinion and the parties' written briefs on appeal that the plaintiffs made a reasonable inquiry into the facts and law and a good faith argument that defendant had waived its defenses, the defendant failed in meeting the burden of proving a violation of ARCP 11 or showing its entitlement to attorney's fees under this section. *Farm Bureau Mut. Ins. Co. v. Campbell*, 315 Ark. 136, 865 S.W.2d 643 (1993).

Defense and Counterclaim.

Chancellor abused his discretion in awarding fees to plaintiff where the issues raised by defendant in defending the action and in pursuing her counterclaim had a basis in fact and a partial basis in law. *Lawson v. Sipple*, 319 Ark. 543, 893 S.W.2d 757 (1995).

Whether counterclaims were filed with the purpose of delaying municipal court claim of \$510 without just cause, it was clear that opponent knew or should have known that he could not prove all the elements or perhaps even one element of complaint. There was no justification for taking the counterclaims to trial when the settlement failed so that he would not be totally empty before the trial court. *Wynn v. Remet*, 321 Ark. 227, 902 S.W.2d 213 (1995).

Fees.

Attorney's fees allowed. *Brown v. Minor*, 305 Ark. 556, 810 S.W.2d 334 (1991).

As a general rule, attorney's fees are not allowed in Arkansas unless expressly authorized by statute; however, in any civil action which the court having jurisdiction finds there was a complete absence of a justiciable issue of either law or fact raised by the losing party or his attorney, the court may award an attorney's fee in an amount not to exceed \$5,000, or ten percent of the amount in controversy. *Elliott v. Hurst*, 307 Ark. 134, 817 S.W.2d 877 (1991).

Where there was no showing of bad faith or harassment in plaintiffs' claim that defective feed caused animals' deaths or that the claim was without any reasonable basis, and thus defendant was not entitled to attorney's fees under this section. *Caplener v. Bluebonnet Milling Co.*, 322 Ark. 751, 911 S.W.2d 586 (1995).

Attorney's fees were not awarded to the defendant city in an inverse condemnation action where there was nothing to indicate that the argument made by the plaintiffs was made in bad faith or solely for the purpose of harassing or maliciously injuring the city. *Thompson v. City of Siloam Springs*, 333 Ark. 351, 969 S.W.2d 639 (1998).

Final Judgment.

The unliquidated award of attorney's fees pursuant to this section is not a final order. *Stewart Title Guar. Co. v. Cassill*, 41 Ark. App. 22, 847 S.W.2d 465 (1993).

This section specifically requires that judgment for attorney's fees be included in the final judgment entered in the action, but no such requirement appears in § 26-35-902. *Stewart Title Guar. Co. v. Cassill*, 41 Ark. App. 22, 847 S.W.2d 465 (1993).

Justiciable Issue.

Where there was not a complete absence of a justiciable issue, chancellor's award of attorney's fees was reversed. *Bailey v. Montgomery*, 31 Ark. App. 1, 786 S.W.2d 594 (1990); *Cureton v. Frierson*, 41 Ark. App. 196, 850 S.W.2d 38 (1993).

On appeal, the question as to whether

there was a complete absence of a justiciable issue shall be determined de novo on the record of the trial court alone. *Elliott v. Hurst*, 307 Ark. 134, 817 S.W.2d 877 (1991).

To obtain an attorney's fee pursuant to subdivision (a)(1), a prevailing party must show there was a complete absence of a justifiable issue of either law or fact raised by the losing party or his attorney; to obtain an attorney's fee or other sanction pursuant to ARCP 11, it must be shown that an attorney or party signed a pleading not ground in fact, not warranted by existing law or a good faith argument for a change in the law, or filed for an improper purpose. *Cowan v. Schmidle*, 312 Ark. 256, 848 S.W.2d 421 (1993).

Limit on Amount.

Where the trial court found that plaintiff's complaint lacked merit, the defendant was entitled to an award of attorney's fees but subject to the limit prescribed by this section. *Steward v. Wurtz*, 327 Ark. 292, 938 S.W.2d 837 (1997).

Review.

Abstracts of the trial court's sanction ruling are required for an appellate court to determine whether the trial court erred in denying fees and costs pursuant to this section; appellate courts will not review the record to make this determination. *McPeck v. White River Lodge Enters.*, 325 Ark. 68, 924 S.W.2d 456 (1996).

Summary Judgment.

Where Supreme Court determined there were disputed issues of material fact, reversing trial court's grant of summary judgment, it could not be said that plaintiffs were pursuing a claim not grounded in fact and that defendant was entitled to attorney's fees under ARCP 11 or this section. *Chlanda v. Killebrew*, 329 Ark. 39, 945 S.W.2d 940 (1997).

Cited: *Martin v. Couey Chrysler Plymouth, Inc.*, 308 Ark. 325, 824 S.W.2d 832 (1992); *Wright v. Keffer*, 319 Ark. 201, 890 S.W.2d 271 (1995); *Marshall Sch. Dist. v. Hill*, 56 Ark. App. 134, 939 S.W.2d 319 (1997).

16-22-310. Liability for civil damages.

(a) No person licensed to practice law in Arkansas and no partnership or corporation of Arkansas licensed attorneys or any of its

employees, partners, members, officers, or shareholders shall be liable to persons not in privity of contract with the person, partnership, or corporation for civil damages resulting from acts, omissions, decisions, or other conduct in connection with professional services performed by the person, partnership, or corporation, except for:

(1) Acts, omissions, decisions, or conduct that constitutes fraud or intentional misrepresentations; or

(2) Other acts, omissions, decisions, or conduct if the person, partnership, or corporation was aware that a primary intent of the client was for the professional services to benefit or influence the particular person bringing the action. For the purposes of this subdivision (a)(2), if the person, partnership, or corporation:

(A) Identifies in writing to the client those persons who are intended to rely on the services, and

(B) Sends a copy of the writing or similar statement to those persons identified in the writing or statement, then the person, partnership, or corporation or any of its employees, partners, members, officers, or shareholders may be held liable only to the persons intended to so rely, in addition to those persons in privity of contract with the person, partnership, or corporation.

(b) This section shall apply only to acts, omissions, decisions, or other conduct in connection with professional services occurring or rendered on or after April 6, 1987.

History. Acts 1987, No. 661, §§ 2, 3.

codified as §§ 16-114-301 — 16-114-303, 17-12-701, and 17-12-702.

Publisher's Notes. This section is also

RESEARCH REFERENCES

Ark. L. Rev. Morrison & George, Arkansas's Privity Requirement for Attorney and Accountant Liability, 51 Ark. L. Rev. 697.

UALR L.J. Survey — Attorneys, 10 UALR L.J. 539.

CASE NOTES

ANALYSIS

Constitutionality.

Construction.

Purpose.

Applicability.

Exceptions.

Fraud.

Standing.

Constitutionality.

This section does not usurp Supreme Court's authority to regulate the practice of law as the statute enunciates the parameters for litigation by clients against attorneys and does not conflict with any

rule or decision by the Supreme Court. *Clark v. Ridgeway*, 323 Ark. 378, 914 S.W.2d 745 (1996).

Construction.

The language of this section appears to be nothing more than a restatement of the general rule of liability. *Almand v. Benton County*, 145 Bankr. 608 (W.D. Ark. 1992).

Purpose.

This section was not intended to make attorneys immune from liability for damages in the case of an intentional tort, but appears to be a legislative statement that the privity requirement still exists in con-

nection with contract or negligence actions. *Almand v. Benton County*, 145 Bankr. 608 (W.D. Ark. 1992).

If this section were to grant an attorney immunity from liability for abuse of process, then this section would be a shield behind which an attorney could take action to intentionally and improperly deprive someone of his property. *Almand v. Benton County*, 145 Bankr. 608 (W.D. Ark. 1992).

Applicability.

This section exempts from its privity requirement actions involving fraud, collusion, or malicious or tortious acts. *Almand v. Benton County*, 145 Bankr. 608 (W.D. Ark. 1992).

This section does not apply to federal civil rights claims. *Almand v. Benton County*, 145 Bankr. 608 (W.D. Ark. 1992).

As a general rule, an attorney is not liable to persons not in privity with him for negligence in the performance of his duties; the attorney is held liable only for conduct constituting fraud, intentional misrepresentations, or intentional torts. *Almand v. Benton County*, 145 Bankr. 608 (W.D. Ark. 1992).

This section protects attorneys from liability to those not in privity with them but excepts from this protection actions for intentional fraud. *Wiseman v. Batchelor*, 315 Ark. 85, 864 S.W.2d 248 (1993).

The contract contemplated by this section relates to a contract for professional services performed by the attorney for the client; thus, where the asserted contract did not relate to attorney's performance of professional services rendered to plaintiff, but rather the alleged breach appears to have been related to attorney's representation of plaintiff's husband in matters concerning divorce, the alleged contract

did not involve attorney's legal representation of plaintiff, and privity of contract was lacking. *Clark v. Ridgeway*, 323 Ark. 378, 914 S.W.2d 745 (1996).

Exceptions.

Although this section uses the terms fraud or intentional misrepresentation when discussing exceptions to the privity requirement, the exception includes intentional torts that are committed on third parties. *Almand v. Benton County*, 145 Bankr. 608 (W.D. Ark. 1992).

A limited exception to the strict privity rule is commonly made when the third party is found to be a third party beneficiary. *Almand v. Benton County*, 145 Bankr. 608 (W.D. Ark. 1992).

The exception to this section appears to be for intentional actions. *Wiseman v. Batchelor*, 315 Ark. 85, 864 S.W.2d 248 (1993).

Fraud.

Complaint alleging actual fraud and constructive fraud against the attorney for an opposing party in prior litigation dismissed for failure to state claim under ARCP 12(b)(6). *Wiseman v. Batchelor*, 315 Ark. 85, 864 S.W.2d 248 (1993).

Where there was no factual basis for the conclusory allegation in plaintiff's amended complaint that attorney intentionally misrepresented his statement of neutrality in divorce case, the attorney was immune under this section. *Clark v. Ridgeway*, 323 Ark. 378, 914 S.W.2d 745 (1996).

Standing.

Privity of contract is not required in order to have a cause of action against an attorney for intentional misrepresentations or fraud. *Calandro v. Parkerson*, 327 Ark. 131, 936 S.W.2d 755 (1997).

SUBCHAPTER 4 — SUSPENSION AND DISBARMENT

SECTION.

16-22-401. Grounds for removal or suspension.

16-22-402. Venue.

16-22-403. Time for hearing.

16-22-404. Service of citation.

16-22-405. Failure to appear — Compelling appearance.

SECTION.

16-22-406. Other charges — Suspension only.

16-22-407. Limitation of proceedings.

16-22-408. Record of conviction or acquittal of offense as evidence.

16-22-409. Trial when offense not indictable.

SECTION.

16-22-410. Verification of charges.

16-22-411. Judgment.

16-22-412. Conviction in another state —
Effect.

SECTION.

16-22-413. Review by Supreme Court.

Publisher's Notes. Some provisions of this subchapter may be superseded by the Arkansas Rules of Court Regulating Professional Conduct of Attorneys at Law.

Cross References. Regulating professional conduct of attorneys, Ark. Const. Amend. 28.

RESEARCH REFERENCES

ALR. Solicitation of business by or for attorney. 5 ALR 4th 866.

Disciplinary action against attorney for misconduct related to performance of official duties. 10 ALR 4th 605.

Conduct in connection with malpractice claim as meriting disciplinary action. 14 ALR 4th 209.

Attorney's delay in handling decedent's estate as ground for disciplinary action. 21 ALR 4th 75.

Disciplinary action against attorney based on communications to judge respecting merits of cause. 22 ALR 4th 917.

Communication with party represented by counsel. 26 ALR 4th 102.

Election campaign activities as ground for disciplining attorney. 26 ALR 4th 170.

Mental or emotional disturbance as defense to or mitigation of charges in attorney disciplinary action. 26 ALR 4th 995.

Assumed or trade name: use as ground for disciplinary action. 26 ALR 4th 1083.

Privilege against self-incrimination in disbarment or other disciplinary proceedings. 30 ALR 4th 243.

Advertising as ground for disciplinary action against attorney. 30 ALR 4th 742.

Failure to co-operate with or obey disciplinary authorities as ground for disciplining attorney. 37 ALR 4th 646.

Bar admission or reinstatement of attorney as affected by alcoholism or alcohol abuse. 39 ALR 4th 567.

Initiating, or threatening to initiate, criminal prosecution as ground for disciplining counsel. 42 ALR 4th 1000.

Sexual misconduct as ground for disciplining attorney. 43 ALR 4th 1062.

Am. Jur. 7 Am. Jur. 2d, Attys, § 25 et seq.

Ark. L. Rev. Discipline of Attorneys for Nonprofessional Misconduct, 5 Ark. L. Rev. 411.

Legal Malpractice, 27 Ark. L. Rev. 452.

Brill, The Arkansas Supreme Court Committee on Professional Conduct 1969-1979: A Call for Reform, 33 Ark. L. Rev. 571.

C.J.S. 7 C.J.S., Atty & C., § 59 et seq.

16-22-401. Grounds for removal or suspension.

Any attorney who is guilty of any felony or infamous crime, of improperly retaining his client's money, of any malpractice, deceit, or misdemeanor in his professional capacity, is an habitual drunkard, or is guilty of any ungentlemanly conduct in the practice of his profession may be removed or suspended from practice, upon charges exhibited against him, and proceedings thereon had as provided in this subchapter.

History. Rev. Stat., ch. 15, § 12; C. & M. Dig., § 610; Pope's Dig., § 650; A.S.A. 1947, § 25-401.

CASE NOTES

ANALYSIS

Discretion of court.
Due process.
Sufficiency of evidence.

Discretion of Court.

The trial court may remove or suspend an attorney, and its discretion in so doing will not be reversed unless abused. *Maloney v. State ex. rel. Prosecuting Att'y*, 182 Ark. 510, 32 S.W.2d 423 (1930). See *McGehee v. State*, 182 Ark. 603, 32 S.W.2d 308 (1930).

Due Process.

The circuit court has the inherent power to disbar an attorney who makes a personal attack upon the judge for his action as such; but the attorney is entitled to notice and an opportunity to be heard in defense, the usual practice being to make charges in writing against the attorney and issue a rule upon him to show cause why he should not be disbarred. *Beene v. State*, 22 Ark. 149 (1860).

16-22-402. Venue.

The charges shall be exhibited in the county in which the offense has been committed, or in which the accused may reside.

History. Rev. Stat., ch. 15, § 13; C. & M. Dig., § 611; Pope's Dig., § 651; A.S.A. 1947, § 25-402.

16-22-403. Time for hearing.

The court in which the charges may be exhibited shall fix a time for the hearing of the charges, allowing a reasonable time to notify the accused.

History. Rev. Stat., ch. 15, § 14; C. & M. Dig., § 612; Pope's Dig., § 652; A.S.A. 1947, § 25-403.

16-22-404. Service of citation.

(a) The clerk of the court in which the charges may be exhibited shall issue a citation, notifying the accused to appear at the time and place fixed for the hearing and answer the charges exhibited against him. A copy of the charges shall be attached to the citation.

(b)(1) The citation may be served in any county in this state.

Sufficiency of Evidence.

Where an attorney sold bonds of his clients, for theft of which they were at the time being prosecuted, the action of the court in suspending the attorney from practice for one year instead of disbarring him was not an abuse of discretion in view of his previous good conduct and professed intention to apply the proceeds on the judgment against his client. *State ex rel. Greene County Bar Ass'n v. Huddleston*, 173 Ark. 686, 293 S.W. 353 (1927).

Evidence that attorney concealed receipt of checks payable to clients in settlement of their claims, that he indorsed and deposited the drafts without clients' authorization and that he drew on the account for payment of personal expenses, was sufficient to support a disbarment order. *Weems v. Supreme Court Comm. on Professional Conduct*, 257 Ark. 673, 523 S.W.2d 900 (1975).

(2) The citation shall be served in the same manner as a summons in suits at law, and the service shall be at least ten (10) days before the return day thereof.

History. Rev. Stat., ch. 15, §§ 15, 16; §§ 653, 654; A.S.A. 1947, §§ 25-404, 25-C. & M. Dig., §§ 613, 614; Pope's Dig., 405.

16-22-405. Failure to appear — Compelling appearance.

If the accused fails to appear according to the command of the citation, his appearance may be compelled by attachment, or the court may proceed *ex parte*.

History. Rev. Stat., ch. 15, § 17; C. & M. Dig., § 615; Pope's Dig., § 655; A.S.A. 1947, § 25-406.

16-22-406. Other charges — Suspension only.

Upon charges other than a conviction for an indictable offense, the court shall have power only to suspend the accused from practice until the facts shall be ascertained in the manner prescribed in this subchapter.

History. Rev. Stat., ch. 15, § 19; C. & M. Dig., § 617; Pope's Dig., § 657; A.S.A. 1947, § 25-408.

16-22-407. Limitation of proceedings.

If the charges are for an indictable offense and no indictment is found or, if found, is not prosecuted to trial within six (6) months, the suspension shall be discontinued unless the delay is produced by the absence or the procurement of the accused, in which case the suspension may continue until the final decision.

History. Rev. Stat., ch. 15, § 20; C. & M. Dig., § 618; Pope's Dig., § 658; A.S.A. 1947, § 25-409.

16-22-408. Record of conviction or acquittal of offense as evidence.

The record of conviction or acquittal of any indictable offense shall in all cases be conclusive evidence of the facts, and the court shall proceed thereon accordingly.

History. Rev. Stat., ch. 15, § 21; C. & M. Dig., § 619; Pope's Dig., § 659; A.S.A. 1947, § 25-410.

16-22-409. Trial when offense not indictable.

When the matter charged is not indictable, the trial of the facts alleged shall be had in the court in which the charges are pending. The trial shall be by jury. If the accused fails to appear or, upon appearing, does not require a jury, the trial shall be by the court sitting without a jury.

History. Rev. Stat., ch. 15, § 22; C. & M. Dig., § 620; Pope's Dig., § 660; A.S.A. 1947, § 25-411.

CASE NOTES**ANALYSIS**

Disciplinary proceedings.
Trial without jury.

Disciplinary Proceedings.

The Supreme Court Committee on Professional Conduct, after hearing charges of professional misconduct, may choose to proceed with disciplinary proceedings according to this section and § 16-22-410 or by the Rules Regulating Professional Con-

duct of Attorneys, and a formal statement of election is unnecessary. *Weems v. Supreme Court Comm. on Professional Conduct*, 257 Ark. 673, 523 S.W.2d 900 (1975).

Trial Without Jury.

The accused is deprived of no right of which he can complain where the case is tried by the court, if the evidence is uncontroverted. *State ex rel. Little Rock Bar Ass'n*, 101 Ark. 210, 142 S.W. 194 (1911).

16-22-410. Verification of charges.

All charges exhibited under this subchapter shall be verified by affidavit and shall be prosecuted by the prosecuting attorney, prosecuting in the district in which the charges are pending.

History. Rev. Stat., ch. 15, § 24; C. & M. Dig., § 622; Pope's Dig., § 662; A.S.A. 1947, § 25-413.

CASE NOTES**Disciplinary Proceedings.**

The Supreme Court Committee on Professional Conduct, after hearing charges of professional misconduct, may choose to proceed with disciplinary proceedings according to this section and § 16-22-409 or

by the Rules Regulating Professional Conduct of Attorneys, and a formal statement of election is unnecessary. *Weems v. Supreme Court Comm. on Professional Conduct*, 257 Ark. 673, 523 S.W.2d 900 (1975).

16-22-411. Judgment.

(a) In all cases of conviction, the court shall pronounce judgment of removal or suspension, according to the facts found.

(b) Every judgment of removal or suspension made in pursuance of this subchapter shall operate, while it continues in force, as a removal or suspension from practice in all the courts of this state.

History. Rev. Stat., ch. 15, §§ 23, 26; §§ 661, 664; A.S.A. 1947, §§ 25-412, 25-C. & M. Dig., §§ 621, 624; Pope's Dig., 415.

CASE NOTES

ANALYSIS

Discretion of court.

Sufficiency of punishment.

Discretion of Court.

This section vests the trial court with discretion either to remove or suspend, which discretion will not be disturbed on appeal save for abuse. *State ex rel. Greene County Bar Ass'n v. Huddleston*, 173 Ark. 686, 293 S.W. 353 (1927).

Sufficiency of Punishment.

On a charge of having secured a divorce on perjured testimony, temporary suspension from practice for one year was sufficient under the circumstances. *McGehee v. State*, 182 Ark. 603, 32 S.W.2d 308 (1930).

16-22-412. Conviction in another state — Effect.

(a) In all cases of conviction for felony or other infamous crime of any attorney at law in any other state or territory of the United States, such conviction, on the production of a copy of the record thereof, shall have the same effect as if such attorney had been convicted in this state.

(b) In all cases of conviction of any of the crimes specified in the preceding section, if the attorney shall have been licensed in this state, after such conviction, his license shall be revoked in the same manner as if the conviction had been had after the granting of such license.

History. Rev. Stat., ch. 15, §§ 27, 28; §§ 665, 666; A.S.A. 1947, §§ 25-416, 25-C. & M. Dig., §§ 625, 626; Pope's Dig., 417.

16-22-413. Review by Supreme Court.

In all cases of a trial of charges, the accused may except to any decision of the court and may prosecute an appeal to the Supreme Court, or writ of error, in all respects as in actions at law.

History. Rev. Stat., ch. 15, § 25; C. & M. Dig., § 623; Pope's Dig., § 663; A.S.A. 1947, § 25-414.

CASE NOTES

Cited: *Beene v. State*, 22 Ark. 149 (1860).

SUBCHAPTER 5 — UNAUTHORIZED PRACTICE OF LAW

SECTION.

16-22-501. Prohibited activities.

16-22-501. Prohibited activities.

(a) A person commits an offense if, with intent to obtain a direct economic benefit for himself or herself, the person:

(1) Contracts with any person to represent that person with regard to personal causes of action for property damages or personal injury;

(2) Advises any person as to the person's rights and the advisability of making claims for personal injuries or property damages;

(3) Advises any person as to whether or not to accept an offered sum of money in settlement of claims for personal injuries or property damages;

(4) Enters into any contract with another person to represent that person in personal injury or property damage matters on a contingent fee basis with an attempted assignment of a portion of the person's cause of action;

(5) Enters into any contract, except a contract of insurance, with a third person which purports to grant the exclusive right to select and retain legal counsel to represent the individual in any legal proceeding; or

(6) Contacts any person by telephone or in person for the purpose of soliciting business which is legal in nature, as set forth above.

(b) This section does not apply to a person currently licensed to practice law in this state, another state, or a foreign country and in good standing with the State Bar of Arkansas and the state bar or licensing authority of any and all other states and foreign countries where licensed.

(c) Except as provided by subsection (d) of this section, an offense under subsection (a) of this section is a Class A misdemeanor.

(d) An offense under subsection (a) of this section is a Class D felony if it is shown on the trial of the offense that the defendant has previously been convicted under subsection (a) of this section.

(e) This section shall not apply to a person who is licensed as an adjuster or employed as an adjuster by an insurer as authorized by § 23-64-101.

History. Acts 1997, No. 1301, § 1.

Publisher's Notes. For the rules of Procedure established by the Supreme Court Committee on the Unauthorized Practice of Law, see the Rules Volume.

Cross References. Regulating the practice of law, Ark. Const. Amend. 28.

CHAPTER 23**LAW LIBRARIES****SECTION.**

16-23-101. Authorization.

16-23-102. County law library boards.

16-23-103. [Repealed.]

SECTION.

16-23-104. Conditions precedent to levy and collection.

16-23-105. County law library book fund.

Effective Dates. Acts 1971, No. 284, § 8: Mar. 15, 1971. Emergency clause provided: "It is hereby found and declared by the General Assembly of the State of Arkansas that a number of counties of this State are in need of legal educational materials and that such materials are immediately necessary for the continued improvement and development of legal education and the administration of justice. Therefore, it is declared, for these reasons, that an emergency exists, and this Act being essential for the preservation of the public peace, health and safety shall take effect and be in full force from and after its passage and approval."

Acts 1975, No. 589, § 5: Mar. 27, 1975. Emergency clause provided: "It is hereby found and declared by the General Assembly of the State of Arkansas that at least one and possibly other county law libraries of this State are currently in need of additional financing to support the purchase of legal educational materials and that without the clear cut application of Act 284 of 1971 to apply to bond forfeitures in criminal cases, such libraries may well cease to exist causing a loss to the counties involved to the extent of books already purchased and depriving the public of a substantial investment which has heretofore been made. Therefore, an emergency is hereby declared to exist and this Act being necessary for the immediate preservation of the public peace, health and safety shall be in full force and effect from and after its passage and approval."

Acts 1977, No. 89, § 3: Jan. 31, 1977. Emergency clause provided: "It is hereby found and determined by the General Assembly that in some counties of the State there are fewer than three practicing attorneys and in such counties it is technically impossible to establish a county law library board as contemplated in the current law since the current law provides for a board of not less than three nor more

than five persons all of whom shall be practicing attorneys residing in the county; that this Act is designed to permit such counties to establish a county law library board by providing that when there are fewer than three practicing attorneys in a county, the three (3) to five (5) member county law library board shall be composed of the practicing attorneys residing in the county together with other legal residents and qualified electors of the county appointed by the county court; that this Act should be given effect immediately in order to enable those counties in which there are fewer than three practicing attorneys to provide for the establishment and maintenance of a law library and to establish a county law library board to administer the county law library, at the the earliest possible date. Therefore, an emergency is hereby declared to exist and this Act being necessary for the immediate preservation of the public peace, health and safety shall be in full force and effect from and after its passage and approval."

Acts 1983, No. 652, § 3: Mar. 22, 1983. Emergency clause provided: "It is hereby found and determined by the General Assembly that in some counties of the state there are excess funds in the County Law Library Book Fund which under the present law cannot be used for any purposes other than the operation and maintenance of the law library, which excess funds could be used appropriately for improvement in the administration of justice in the county if this Act is amended, and this Act is necessary for improvement in the administration of justice in the several counties of the state. Therefore, an emergency is hereby declared to exist and this Act being necessary for the immediate preservation of the public peace, health and safety shall be in full force and effect from and after its passage and approval."

16-23-101. Authorization.

(a) Any county of this state is authorized to own, operate, and maintain a county law library and, in connection therewith, to own, buy, sell, lend, borrow, receive bequests and donations of, and otherwise deal in and contract concerning books, volumes, treatises, pamphlets, and other educational materials useful for the purpose of legal education

and to use therefor any available funds, including proceeds of the court costs levied and collected pursuant to the provisions of this chapter.

(b) The funds derived from the levy of costs in criminal and civil cases as provided by this chapter may be used for any purpose relating to the establishment, maintenance, and operation of a county law library, including, but not limited to:

(1) Construction, renovation, and maintenance of facilities to house such libraries;

(2) The purchase of books, supplies, furnishings, and appointments;

(3) The payment of salaries and expenses of librarians and assistants; and

(4) Such other expenditures necessary to carry out the purpose and intent of this chapter.

(c)(1) Each county which has two (2) judicial districts, an organized bar association organized in each district prior to March 1, 1991, and a county law library established prior to March 1, 1991, shall create a county law library to be located within each judicial district.

(2) The court costs levied under this chapter and collected by the courts within the judicial districts shall be used only for the county law library located within that judicial district.

History. Acts 1971, No. 284, § 1; 1985, No. 915, § 1; A.S.A. 1947, § 25-504; Acts 1991, No. 1241, § 1.

16-23-102. County law library boards.

(a)(1) A county law library established pursuant to this chapter shall be under the control of a county law library board of not less than three (3) nor more than five (5) persons, who shall be practicing attorneys residing in the county and who shall be appointed by the county court from attorneys nominated by the county bar association or, in counties where there is no county bar association, by a regional bar association which includes that county.

(2) In any county in which there are fewer than three (3) practicing attorneys, the board shall be composed of not less than three (3) nor more than five (5) persons, including the practicing attorney or attorneys in the county together with one (1) or more additional persons who are legal residents and qualified electors of the county, appointed by the county court.

(b) Members of the board shall be appointed for a term of five (5) years, but the initial appointments shall be so arranged that the terms of each member initially appointed expire in succeeding years.

(c)(1) The board shall have charge of the operation and maintenance of the county law library and the custody and care of its property. It shall direct the expenditure of funds derived for law library purposes under this chapter, and any other funds received by the county, or the board, for the use of the law library.

(2) Any excess funds in the county law library book fund not needed for the operation and maintenance of the county law library may be

expended by the board for any other purpose necessary for improvement in the administration of justice in the county.

(d)(1) The board, subject to approval of the county court, is authorized, in implementation of the purposes of this chapter, to enter into agreements with any person, including other public bodies, in this state pertaining to the operation and maintenance of a county law library.

(2) Without limiting the generality of the foregoing, agreements entered into pursuant to the provisions hereof may contain provisions:

(A) Making available to any institution of higher learning the county law library, and related facilities, and the books, volumes, treatises, pamphlets, and other educational materials located therein;

(B) Authorizing the institution to maintain, locate, and relocate in the county law library, select, replace, supervise the use of, buy, sell, lend, borrow, receive bequests and donations of, and otherwise deal in and contract concerning, such books, volumes, treatises, pamphlets, and other educational materials; and

(C) Providing for the operation, maintenance, and supervision of the county law library and related facilities for the benefit of the institution, the county, judges and attorneys, and the public.

(3) The agreements may make available to the institution all or a portion of the collections of the costs levied pursuant to the provisions of this chapter, for the purpose of performing the obligations of the institution thereunder.

History. Acts 1971, No. 284, §§ 4, 5; 1977, No. 89, § 1; 1983, No. 652, § 1; A.S.A. 1947, §§ 25-507, 25-508.

CASE NOTES

Constitutionality.

This section is not a "special act" within the meaning of the 14th Amendment to

the Arkansas Constitution. *Nahlen v. Woods*, 255 Ark. 974, 504 S.W.2d 749 (1974).

16-23-103. [Repealed.]

Publisher's Notes. This section, concerning levy of costs, was repealed by Acts 1995, No. 1256, § 20, as amended by Acts 1995 (1st Ex. Sess.), No. 13, § 4. The

section was derived from Acts 1971, No. 284, § 2; 1975, No. 589, § 1; 1985, No. 915, § 2; A.S.A. 1947, § 25-505; Acts 1987, No. 773, § 1.

16-23-104. Conditions precedent to levy and collection.

(a) The costs levied pursuant to the provisions of this chapter shall not be levied and collected unless there has been filed with the county court of a county a resolution of the county bar association or, in counties where there is no county bar association, a resolution of the regional bar association which includes that county, signed by the president and attested to by the secretary of such bar association,

requesting the levying and collecting of the costs levied pursuant to the provisions of this chapter.

(b) After receipt of the resolution, the county court may enter an order levying the costs levied pursuant to the provisions of this chapter and directing their collection.

History. Acts 1971, No. 284, § 3; A.S.A. 1947, § 25-506.

16-23-105. County law library book fund.

All collections from costs levied pursuant to the provisions of this chapter shall forthwith be paid over by the collecting officer to the county treasurer and by him credited on his records to a fund to be designated and known as the county law library book fund. The book fund shall be used for no other purposes than those provided in this chapter, and expenditures therefrom shall not require appropriation by the quorum court.

History. Acts 1971, No. 284, § 2; 1985, No. 915, § 2; A.S.A. 1947, § 25-505.

CHAPTERS 24-29

[Reserved]

SUBTITLE 3. JURIES AND JURORS

CHAPTER 30

GENERAL PROVISIONS

SECTION.

16-30-101. Multijudge and divided circuits.

SECTION.

16-30-102. Alternate jurors.

16-30-103. Oaths.

Cross References. Right to trial by jury, Ark. Const., Art. 2, § 7; Ark. Const. Amend. 16.

Preambles. Acts 1963, No. 490 contained a preamble which read: "Whereas, in many lengthy civil and criminal trials in circuit courts of this State it sometimes occurs that a juror may become ill, pass on or otherwise become incapacitated; and

"Whereas, the General Assembly of the State of Arkansas thinks it necessary in the interest of justice that alternate jurors be provided for, to be selected only within the sound discretion of the court; and

"Whereas, the utilization of alternate

jurors may in many instances prevent mistrials and nonsuits, thus averting expensive retrials;

"Now, therefore...."

Effective Dates. Acts 1969, No. 568, § 29 provided: "This Act shall be effective on and after January 1, 1970, except that the procedures outlined in this Act to be carried out prior to the empaneling of a jury shall be effective on and after July 1, 1969, so that jurors empaneled at terms of any circuit court beginning after January 1, 1970, shall be selected as provided herein."

CASE NOTES

ANALYSIS

In general.
Construction.

In General.

In this state, jurors are presumed to be unbiased. *Stewart v. State*, 320 Ark. 75, 894 S.W.2d 930 (1995).

Construction.

Acts 1969, No. 568 must be construed as mandatory and not as directory only. *Horne v. State*, 253 Ark. 1096, 490 S.W.2d 806 (1973).

Cited: *Cantrell v. State*, 265 Ark. 263, 577 S.W.2d 605 (1979).

16-30-101. Multijudge and divided circuits.

(a) In multijudge circuits, the circuit judges may select one (1) of their number to perform any of the duties imposed upon a judge by this act.

(b) Divisions of any circuit court may either have separate jury commissioners and jurors, or the judges by concurrence may share a single set of commissioners, a single jury wheel or box, or a single list of jurors.

History. Acts 1969, No. 568, § 28; 16-31-101 — 16-31-104, 16-31-106, 16-31-A.S.A. 1947, § 39-220. 107, 16-32-101 — 16-32-104, 16-32-106,

Meaning of "this act". Acts 1969, No. 16-32-107, 16-32-109.
568, codified as §§ 16-30-101, 16-30-103,

16-30-102. Alternate jurors.

(a) When in the discretion of the court it shall be deemed advisable in the interests of the furtherance of justice, the court may direct that not more than three (3) jurors in addition to the regular jury be called and impaneled to sit as alternate jurors. Alternate jurors, in the order in which they are called, shall replace jurors who, prior to the time the jury retires to consider its verdict, become unable or disqualified to perform their duties.

(b) Alternate jurors shall be drawn in the same manner, shall have the same qualifications, shall be subject to the same examinations and challenges, shall take the same oath, and shall have the same functions, powers, facilities, and privileges as the regular jurors. An alternate juror who does not replace a regular juror shall be discharged after the jury retires to consider its verdict.

(c) Each opposing side shall be entitled to one (1) peremptory challenge in addition to those otherwise allowed by law. The additional peremptory challenges may be used against an alternate juror only, and the other peremptory challenges allowed by these rules by this section may not be used against an alternate juror.

History. Acts 1963, No. 490, §§ 1-3; A.S.A. 1947, §§ 39-232 — 39-234.

Publisher's Notes. Committee comments to Rule 47 of the Arkansas Rules of

Civil Procedure indicate that this section is superseded by Rule 47 with respect to civil proceedings but is probably not superseded with respect to criminal proceedings.

A.C.R.C. Notes. The Supreme Court of Arkansas stated in a Per Curiam of Nov. 24, 1986, that subsections (a) and (c) of this section were deemed superseded by the Arkansas Rules of Civil Procedure.

RESEARCH REFERENCES

UALR L.J. Note, Peremptory Challenges After *Purkett v. Elam*, 115 S. Ct. 1769 (1995): How to Judge a Book By Its

Cover Without Violating Equal Protection, 19 UALR L.J. 249.

CASE NOTES

ANALYSIS

Peremptory challenges.
Presence in jury room.
Standard of review.
—Racial discrimination.

Peremptory Challenges.

Both in this case and in *Miller v. Lockhart*, 861 F. Supp. 1425 (E.D. Ark. 1994), the prosecutor consistently and systematically excluded African-Americans from participating as jurors through the use of peremptory challenges. *Ford v. Lockhart*, 861 F. Supp. 1447 (E.D. Ark. 1994), petition dismissed, *In re Norris*, 38 F.3d 1046 (8th Cir. 1994), *aff'd sub nom. Ford v. Norris*, 67 F.3d 162 (8th Cir. 1995).

Defendant's change-of-venue motion alleging adverse pretrial publicity was properly denied in light of the testimony introduced at the hearing which showed less-than-pervasive publicity, the failure of defendant to demonstrate during voir dire that there were publicity-affected jurors,

and the fact that he did not use all his peremptory challenges. *Rankin v. State*, 329 Ark. 379, 948 S.W.2d 397 (1997).

Presence in Jury Room.

Where the trial court found that no extraneous prejudicial information was improperly brought to the jury's attention, nor was any outside influence brought to bear upon any juror as a result of an alternate juror's presence in the jury room for a short time, defendant did not show he suffered any prejudice. *McDonald v. State*, 37 Ark. App. 61, 824 S.W.2d 396 (1992).

Standard of Review.

—Racial Discrimination.

A constitutional violation involving the selection of jurors in a racially discriminatory manner is a "structural defect" in the trial mechanism which cannot be subjected to a harmless error analysis. *Ford v. Norris*, 67 F.3d 162 (8th Cir. 1995).

16-30-103. Oaths.

(a) The following oath, in substance, shall be administered to the grand jurors:

"Saving yourselves and fellow jurors, you do swear that you will diligently inquire of, and present all treasons, felonies, misdemeanors, and breaches of the penal laws over which you have jurisdiction, of which you have knowledge or may receive information."

(b) Petit jurors upon being impaneled pursuant to this act shall take the following oath:

"I do solemnly swear (or affirm) that I will well and truly try each and all of the issues submitted to me as a juror and a true verdict render according to the law and the evidence."

History. Crim. Code, § 406; Acts 1871, No. 49, § 1 [406], p. 255; C. & M. Dig., § 2979; Pope's Dig., § 3801; Acts 1969, No. 568, § 24; A.S.A. 1947, §§ 39-216, 43-904.

Meaning of "this act". See note to § 16-30-101.

CASE NOTES

ANALYSIS

Criminal cases.

Grand jurors.

Criminal Cases.

The oath of jurors required in criminal cases is that prescribed by § 16-89-109. *Chiles v. State*, 45 Ark. 143 (1885); *Mabry v. State*, 50 Ark. 492, 8 S.W. 823 (1888) (decisions under prior law).

Grand Jurors.

The record entry of the swearing of the grand jury must show that all of them were sworn; otherwise, the judgment of conviction will be reversed and, upon return of the case, unless a nunc pro tunc order that all were sworn can be truthfully made, the prisoner may be held to answer a new indictment. *Baker v. State*, 39 Ark. 180 (1882), overruled on other grounds, *Hobbs v. State*, 86 Ark. 360, 111 S.W. 264 (1908).

CHAPTER 31

JUROR QUALIFICATIONS AND EXEMPTIONS

SECTION.

- 16-31-101. Qualifications.
- 16-31-102. Disqualifications.
- 16-31-103. Exemptions from service.
- 16-31-104. Limitations on frequency and period of service.
- 16-31-105. Exemption from overtime parking penalties.

SECTION.

- 16-31-106. Penalty for employees' service prohibited.
- 16-31-107. Effect of unqualified juror upon verdict or indictment.
- 16-31-108. Interpreters for visually or hearing impaired jurors.

Effective Dates. Acts 1971, No. 364, § 3: Mar. 23, 1971. Emergency clause provided: "It has been found and is declared by the General Assembly of Arkansas that the present law is uncertain as to whether a petit juror is required to continue to report for his period of permitted service when the calendar year for which he is selected has ended and that this Act is needed in order to avoid confusion and provide for the proper administration of justice. Therefore, an emergency is declared to exist and this Act, being necessary for the preservation of the public peace, health and safety, shall take effect and be in force from the date of its approval."

Acts 1975, No. 650, § 19: Mar. 28, 1975. Emergency clause provided: "It is hereby found and determined by the General Assembly that there is a shortage of practitioners of veterinary medicine in the State

of Arkansas and that the revision of the laws governing the practice of veterinary medicine including but not limited to the certification of animal technicians will help alleviate such shortage and that the immediate passage of this Act is necessary to provide a safeguard for the people of the State of Arkansas against dishonest, incompetent and unprincipled practitioners of veterinary medicine. Therefore an emergency is hereby declared to exist, and this Act being immediately necessary for the preservation of the public peace, health and safety shall be in full force and effect from and after its passage and approval."

Acts 1994 (1st Ex. Sess.), No. 4, § 6: Mar. 4, 1994. Emergency clause provided: "It is hereby found and determined by the General Assembly that Arkansas Code 16-31-102 disqualifies from acting as a juror any person who is mentally retarded

or insane, and any person whose sense of hearing or seeing is substantially impaired; this act eliminates those disqualifications and in their place disqualifies from jury service persons who by reason of a physical or mental disability are unable to render jury services, with the exception that no person may be disqualified solely on the basis of loss of hearing or sight; this modification to Arkansas Code 16-31-102 will bring Arkansas law into compliance with federal law; and this act should go into effect immediately in order to allow those persons to begin serving as grand or petit jurors as soon as possible. Therefore, an emergency is hereby declared to exist, and this act being immediately necessary for the preservation of the public peace, health, and safety shall be in full force and effect from and after its passage and approval."

Acts 1995, No. 897, § 5: Apr. 4, 1995. Emergency clause provided: "It is hereby found and determined by the General Assembly of the State of Arkansas that this act authorizes necessary additional auxiliary aids for persons with hearing impairments who are called for jury duty; this modification to Arkansas Code 16-31-108 is necessary to enable persons with hearing impairments to serve on Arkansas juries; and this act should go into effect immediately in order to allow for those accommodations as soon as possible. Therefore, an emergency is hereby declared to exist and this act being necessary for the immediate preservation of the public peace, health, and safety, shall be in full force and effect from and after its passage and approval."

RESEARCH REFERENCES

Am. Jur. 47 *Am. Jur.* 2d, *Jury*, § 96 et seq.

Ark. L. Rev. *Arkansas Civil Juries*, 21 *Ark. L. Rev.* 527.

The Arkansas Jury Wheel Act of 1969, 24 *Ark. L. Rev.* 43.

Criminal Procedure: A Survey of Arkansas Law and the American Bar Association's Standards, 26 *Ark. L. Rev.* 169.

Gingerich, *The Arkansas Grand Jury*, Etc., 40 *Ark. L. Rev.* 55.

C.J.S. 50 *C.J.S.*, *Juries*, § 134 et seq.

UALR L.J. Sullivan, *An Overview of the Law of Jury Selection for Arkansas Criminal Trial Lawyers*, 15 *UALR L.J.* 37.

CASE NOTES

Construction.

Acts 1969, No. 568, must be construed as mandatory and not as directory only. *Horne v. State*, 253 *Ark.* 1096, 490 *S.W.2d* 806 (1973).

Cited: *Rathbun v. Ward*, 315 *Ark.* 264, 866 *S.W.2d* 403 (1993).

16-31-101. Qualifications.

Every registered voter who is a citizen of the United States and a resident of the State of Arkansas and of the county in which he or she may be summoned for jury service is legally qualified to act as a grand or petit juror if not otherwise disqualified under the express provisions of this act.

History. Acts 1969, No. 568, § 1; A.S.A. 1947, § 39-101.

Meaning of "this act". Acts 1969, No. 568, codified as §§ 16-30-101, 16-30-103,

16-31-101 — 16-31-104, 16-31-106, 16-31-107, 16-32-101 — 16-32-104, 16-32-106, 16-32-107, 16-32-109.

CASE NOTES

Residency.

Where juror did not meet qualifications because she was not a resident of the county where the case was tried, but she did not knowingly answer falsely any question on voir dire relating to her qualifications, the verdict was not voidable. *Bennett v. State*, 308 Ark. 393, 825 S.W.2d 560 (1992).

Although defendant's jury included a woman who was a registered voter in the county where the trial was held but was

not a resident of that county, defendant was not prejudiced or denied an impartial jury. *Bennett v. Lockhart*, 39 F.3d 848 (8th Cir. 1994), cert. denied, 514 U.S. 1018, 115 S. Ct. 1363, 131 L. Ed. 2d 219 (1995).

Cited: *Jackson v. State*, 249 Ark. 653, 460 S.W.2d 319 (1970); *Renton v. State*, 274 Ark. 87, 622 S.W.2d 171 (1981); *Brown v. Lockhart*, 781 F.2d 654 (8th Cir. 1986); *Farmers Bank v. Perry*, 301 Ark. 547, 787 S.W.2d 645 (1990).

16-31-102. Disqualifications.

(a) The following persons are disqualified to act as grand or petit jurors:

(1) Persons who do not meet the qualifications of § 16-31-101;

(2) Persons who are unable to speak or understand the English language;

(3) Persons who are unable to read or write the English language, except that the circuit judge, in the exercise of his discretion, may waive these requirements when the persons are otherwise found to be capable of performing the duties of jurors;

(4) Persons who have been convicted of a felony and have not been pardoned;

(5) Persons who are not of good character or approved integrity, are lacking in sound judgment or reasonable information, are intemperate, or are not of good behavior; and

(6) Persons who, by reason of a physical or mental disability, are unable to render satisfactory jury service, except that no person shall be disqualified solely on the basis of loss of hearing or sight in any degree.

(b) Except by the consent of all the parties, no person shall serve as a petit juror in any case who:

(1) Is related to any party or attorney in the cause within the fourth degree of consanguinity or affinity;

(2) Is expected to appear as a witness or has been summoned to appear as a witness in the cause;

(3) Has formed or expressed an opinion concerning the matter in controversy which may influence his judgment;

(4) May have a material interest in the outcome of the case;

(5) Is biased or prejudiced for or against any party to the cause or is prevented by any relationship or circumstance from acting impartially; or

(6) Was a petit juror in a former trial of the cause or of another case involving any of the same questions of fact.

(c) Nothing in this section shall limit a court's discretion and obligation to strike jurors for cause for any reason other than solely because of sight or hearing impairment.

History. Acts 1969, No. 568, §§ 2, 5; A.S.A. 1947, §§ 39-102, 39-105; Acts 1994 (1st Ex. Sess.), No. 4, § 1.

Amendments. The 1994 (1st Ex. Sess.) amendment inserted "persons" in the in-

troductory language of (a); deleted former (a)(2) and (a)(6), redesignating the remaining subdivisions accordingly; added present (a)(6); and added (c).

RESEARCH REFERENCES

Ark. L. Rev. Witnesses, 27 Ark. L. Rev. 229.

CASE NOTES

ANALYSIS

Constitutionality.

Ability to hear.

Ability to read or write.

Affinity.

Bias.

Discretion of court.

Felon.

Law enforcement officer.

Opinion.

Relationship.

Same questions of fact.

Witness.

Constitutionality.

The state has a legitimate interest in providing physically competent jurors for trials in criminal cases, and the disqualification from jury service of persons with substantial hearing impairments rationally relates to and furthers that interest and does not violate the Fourteenth Amendment to the United States Constitution. Moreover, the Sixth Amendment to the United States Constitution requires that prospective jurors possess the physical and mental attributes necessary to adequately receive and evaluate the evidence presented. *Eckstein v. Kirby*, 452 F. Supp. 1235 (E.D. Ark. 1978).

This section is not unconstitutional on its face because it can be put into effect without any racial discrimination whatever. *Westbrook v. State*, 274 Ark. 309, 624 S.W.2d 433 (1981).

Ability to Hear.

Whether a person is legitimately disqualified from jury service on account of a substantial hearing impairment is a question of law committed to the sound discretion of the trial court. *Eckstein v. Kirby*, 452 F. Supp. 1235 (E.D. Ark. 1978).

The presence of a thirteenth person

serving as an interpreter for a deaf juror during jury deliberations would violate the secrecy of the jury room and thereby deprive an accused person of his right to trial by jury. *Eckstein v. Kirby*, 452 F. Supp. 1235 (E.D. Ark. 1978).

Ability to Read or Write.

A trial court is not required to disclose to counsel a juror's inability to read or write. Illiteracy, as a disqualification for jury service, would be excepted in the discretion of the judge rather than of counsel. *Arkansas La. Gas Co. v. Morgan*, 256 Ark. 250, 506 S.W.2d 560 (1974).

Affinity.

"Affinity" is the tie which arises from marriage between the husband and the blood relations of the wife, and between the wife and the blood relations of the husband; there is no affinity between the blood relations of the husband and the blood relations of the wife. *Mitchell v. Goodall*, 297 Ark. 332, 761 S.W.2d 919 (1988).

There can be no affinity between the blood relations of the husband and the blood relations of the wife, and juror would not be disqualified to serve on the jury under § 16-31-107 because her in-laws were related to plaintiffs by marriage. *Farmers Bank v. Perry*, 301 Ark. 547, 787 S.W.2d 645 (1990).

Bias.

Where a juror acknowledged during voir dire that his nephew was a drug undercover agent and that he had talked with the nephew about his experiences, the juror's presumptive bias, even after court interrogation, was sufficient to require his exclusion from the trial of defendant for sale and delivery of a controlled substance. *Pickens v. State*, 260 Ark. 633, 542 S.W.2d 764 (1976).

Jurors are assumed to be unbiased; the burden of demonstrating actual bias on the part of any member of the panel is on the petitioner. *Urquhart v. State*, 275 Ark. 486, 631 S.W.2d 304 (1982).

Discretion of Court.

The question of a juror's qualification lies within the sound judicial discretion of the trial judge and defendant has the burden of showing the prospective juror's disqualification. *Beed v. State*, 271 Ark. 526, 609 S.W.2d 898 (1980).

This section essentially codifies the existing case law and does not change the fact that the seating of a juror is a matter to be determined at the discretion of the trial judge. *Irons v. State*, 272 Ark. 493, 615 S.W.2d 374 (1981).

The impartiality of a prospective juror is a question of fact for the trial court to determine in its sound discretion. *Urquhart v. State*, 275 Ark. 486, 631 S.W.2d 304 (1982).

Felon.

A juror who, at the age of twelve or thirteen, was found guilty of burglary and sentenced to the Arkansas Boys' Industrial School, which sentence was suspended, was not a convicted felon within the meaning of this section and was not thereby disqualified to act as a juror. *Tucker v. State*, 248 Ark. 979, 455 S.W.2d 888 (1970).

Although subdivision (a)(5) of this section disqualifies convicted felons from serving on a jury, where no juror was asked during voir dire whether he or she had been convicted of a felony, the trial court did not abuse his discretion in finding the juror, who had been convicted of a felony, did not knowingly answer falsely to any question on voir dire, and thus, the jury's verdict was not void or voidable under § 16-31-107. *Zinger v. State*, 313 Ark. 70, 852 S.W.2d 320 (1993).

Law Enforcement Officer.

The fact that a venireman held a card showing him to be an honorary deputy sheriff was not sufficient reason to excuse him for cause. *Cotton v. State*, 256 Ark. 527, 508 S.W.2d 738 (1974).

Opinion.

Where juror, when examined by the court, showed clearly that he had not formed or expressed an opinion, this sec-

tion had no application even though juror was employed by investment company in which witness for party was principal stockholder. *Arkansas State Hwy. Comm'n v. Kennedy*, 233 Ark. 844, 349 S.W.2d 132 (1961) (decision under prior law).

This section does not make any substantial change in the law and whether venireman's opinion may influence his judgment is a matter to be determined by the trial judge. *Satterfield v. State*, 252 Ark. 747, 483 S.W.2d 171 (1972).

Relationship.

If the challenging party fails to make out a prima facie case of the juror's relationship within the prohibited degree by questions asked of the juror or by offer of other proof, there will be no error on the part of the court in pronouncing the juror competent. *Shaffstall v. Downey*, 87 Ark. 5, 112 S.W. 176 (1908) (decision under prior law).

That two of the jurors of the panel from which a drawn jury was to be selected were related to a person who was killed in the same automobile collision in which the plaintiff's intestate was killed did not render them disqualified. *Roark Transp., Inc. v. West*, 188 Ark. 941, 68 S.W.2d 1000 (1934) (decision under prior law).

The trial court did not commit reversible error in discharging a juror related to defendant within the prohibited degree. *McDaniel v. State*, 228 Ark. 1122, 313 S.W.2d 77 (1958) (decision under prior law).

The relationship of a juror to a witness did not per se disqualify the juror. *Arkansas State Hwy. Comm'n v. Bryant*, 233 Ark. 841, 349 S.W.2d 349 (1961) (decision under prior law).

Where a close relative of a juror was a witness to a controverted issue in the case and matter was brought to the attention of the trial court before the jury was sworn, it was an abuse of discretion for trial court to refuse to strike relative from the jury for cause. *Arkansas State Hwy. Comm'n v. Young*, 241 Ark. 765, 410 S.W.2d 120 (1967) (decision under prior law).

The trial court did not err in failing to excuse a juror who was the wife of an assistant police chief. *Johnson v. State*, 270 Ark. 871, 606 S.W.2d 381 (1980).

A juror was properly excused by the

court after being accepted by both prosecution and defense when it was learned that he was a cousin to a secretary of the prosecuting attorney, since the judge has the discretion to excuse a juror even where the issue of bias may be more implied than actual and even though the situation does not clearly fall within this section or § 16-33-304, since it would be impossible for the statutes to cover every conceivable circumstance touching on a juror's possible bias. *Ruiz v. State*, 273 Ark. 94, 617 S.W.2d 6, cert. denied, 454 U.S. 1093, 102 S. Ct. 659, 70 L. Ed. 2d 631 (1981).

Juror, whose husband was a cousin of a paralegal working for one party's law firm, was not shown to be within the prohibited degree of relationship. *Carton v. Missouri Pac. R.R.*, 315 Ark. 5, 865 S.W.2d 635 (1993).

Same Questions of Fact.

Where a number of cases involving the same issue are pending against the same defendant, a juror who sat in one of them and rendered a verdict, or who was a plaintiff in another of those actions, is presumed to be under a disqualifying bias against the defendant and is incompetent to sit as a juror in another of those cases. *Missouri Pac. Ry. v. Smith*, 60 Ark. 221, 29 S.W. 752 (1895); *Little Rock & Ft. S. Ry. v. Wells*, 61 Ark. 354, 33 S.W. 208 (1895) (decisions under prior law).

The court did not abuse its discretion in not making the members of the regular panel available who had served on a connected case. *Wells v. State*, 247 Ark. 386, 446 S.W.2d 217 (1969) (decision under prior law).

The credibility of a government witness who had testified against different defendants in previous prosecutions for selling marijuana was not a "question of fact" within the meaning of subdivision (b)(6) of this section, and thus jurors who had served at the preceding trials were not disqualified from defendant's trial for sale of marijuana. *Holland v. State*, 260 Ark. 617, 542 S.W.2d 761 (1976); *Pickens v. State*, 260 Ark. 633, 542 S.W.2d 764 (1976).

Witness.

Where juror had been summoned as a witness but did not testify and no objection was made to his serving as a juror before he was sworn in as a juror, the trial court did not err in refusing to grant a new trial. *Arkansas State Hwy. Comm'n v. Bryant*, 233 Ark. 841, 349 S.W.2d 349 (1961) (decision under prior law).

Cited: *Rector v. State*, 280 Ark. 385, 659 S.W.2d 168 (1983); *Harrod v. State*, 286 Ark. 277, 691 S.W.2d 172 (1985); *Brown v. Lockhart*, 781 F.2d 654 (8th Cir. 1986); *Hulsey v. Sargent*, 821 F.2d 469 (8th Cir. 1987); *Bennett v. State*, 308 Ark. 393, 825 S.W.2d 560 (1992).

16-31-103. Exemptions from service.

Any person may be excused from serving as a grand or petit juror or a jury commissioner for such period as the court deems necessary or may have his service deferred to another specified term of court when the state of his health or that of his family reasonably requires his absence, or when, for any reason, his own interests or those of the public will, in the opinion of the court, be materially injured by his attendance.

History. Acts 1969, No. 568, §§ 7, 8; 1971, No. 374, § 1; 1975, No. 650, § 16; 1979, No. 612, § 1; 1981, No. 294, §§ 1, 2; 1985, No. 291, § 1; A.S.A. 1947, §§ 39-107, 39-108, 39-121, 39-122, 72-1147; Acts 1991, No. 379, § 1; 1993, No. 167, § 1.

Amendments. The 1993 amendment inserted "or may have his service deferred to another specified term of court."

RESEARCH REFERENCES

UALR L.J. Legislative Survey, Civil Procedure, 8 UALR L.J. 555.

Survey—Civil Procedure, 14 UALR L.J. 747.

CASE NOTES

ANALYSIS

Automatic excusal.
Discretion of court.
Excusal held proper.
Farmers.
Objection to service.
Prejudice.

Automatic Excusal.

The automatic excusal of 12 jurors and an alternate in one lot, however laudable the trial court's intention may have been to spare the previous jury a second consecutive trial and however well-known or established the court's policy may have been, it amounted to a systematic exclusion to exempt as a body the 13 jurors and, as such, was error. *Jones v. State*, 318 Ark. 704, 889 S.W.2d 706 (1994).

Discretion of Court.

Court did not abuse its discretion by allowing possible jurors to be excused for reasons stated in this section, where there was no deliberate exclusion of a large class of eligible jurors. *Miller v. State*, 269 Ark. 341, 605 S.W.2d 430 (1980), cert. denied, 450 U.S. 1035, 101 S. Ct. 1750, 68 L. Ed. 2d 232 (1981).

Trial court properly excused persons from the jury venire, without affording trial counsel a chance to voir dire them with respect to the reasons they did not wish to serve, since the trial court has the discretion to excuse any juror to protect the public interest or the court's interests. *Collins v. State*, 271 Ark. 825, 611 S.W.2d 182, cert. denied, 452 U.S. 973, 101 S. Ct. 3127, 69 L. Ed. 2d 984 (1981); *Race v. National Cashflow Sys.*, 30 Ark. App. 116, 783 S.W.2d 370 (1990).

A court's power to excuse jurors need not be exercised only for good cause shown; this section vests in the trial judge the discretion to excuse any juror. *Ruiz v. Norris*, 868 F. Supp. 1471 (E.D. Ark. 1994), aff'd, 71 F.3d 1404 (8th Cir. 1995), cert. denied, 519 U.S. 963, 117 S. Ct. 384, 136 L. Ed. 2d 301 (1996).

Excusal Held Proper.

The trial court did not err in excusing one of the selected jurors to allow the juror to attend a job interview on the day scheduled for trial. *Latham v. State*, 318 Ark. 19, 883 S.W.2d 461 (1994).

Farmers.

The wholesale excusal from the venire of individuals who claim farming as their occupation is reversible error if it is automatic and based solely on that fact. *Jones v. State*, 317 Ark. 131, 876 S.W.2d 262 (1994).

Where trial judge noted that the farmers were harvesting their crop and would suffer extreme hardship if they served, the trial court further stated that the farmers were excused only after requesting to be excused "either orally before the court or through questionnaires," there was not a wholesale dismissal of potential jury members based solely on occupation. *Jones v. State*, 317 Ark. 131, 876 S.W.2d 262 (1994).

While the wholesale excusal from the venire of persons who claim farming as their occupation is reversible error if it is automatic and based solely on that fact, when each farmer is considered on an individual basis and the trial court determines that each would suffer extreme hardship, no systematic exclusion has occurred. *Jones v. State*, 318 Ark. 704, 889 S.W.2d 706 (1994).

Objection to Service.

Disqualification was waived by the juror's failure to claim the excuse of being over 65 years of age. *Edens v. State*, 235 Ark. 178, 359 S.W.2d 432 (1962), cert. denied, 371 U.S. 968, 83 S. Ct. 551, 9 L. Ed. 2d 538 (1963) (decision under prior law).

This section does not provide for the automatic exclusion of persons within the classifications mentioned, but rather provides for exclusion if the individual objects to serving and makes the court aware of such objection before the jury is sworn. *Penelton v. State*, 277 Ark. 225, 640 S.W.2d 795 (1982).

Prejudice.

In cases involving alleged irregularities in the jury panel and its selection, the appellant must demonstrate prejudice as well as any error. *Ruiz v. State*, 299 Ark. 144, 772 S.W.2d 297 (1989).

Prejudice in jury selection is not presumed simply because error might have occurred; the basic issue decided by the appellate court on review is not whether it

approves or disapproves of the procedure followed in jury selection, but whether there was prejudicial error. *Race v. National Cashflow Sys.*, 30 Ark. App. 116, 783 S.W.2d 370 (1990).

Cited: *Cotton v. State*, 256 Ark. 527, 508 S.W.2d 738 (1974); *Berna v. State*, 282 Ark. 563, 670 S.W.2d 434 (1984); *Gardner v. State*, 296 Ark. 41, 754 S.W.2d 518 (1988).

16-31-104. Limitations on frequency and period of service.

(a) Any person who is sworn as a member of a grand or petit jury shall be ineligible to serve on another grand or petit jury in the same county for a period of two (2) years from the date the person is excused from further jury service by the court or by operation of law.

(b) No petit juror shall be required to report for jury duty on more than twenty-four (24) days or for more than a six-month period during the calendar year for which he is selected, except that any juror actually engaged in the trial of a case at the time of the expiration of the period of permitted service shall serve until the trial of the case is concluded. Any juror who has not been required to report for the period of permitted service during the calendar year for which he is selected shall be required, unless excused by the court, to continue to report until the expiration of the period even though the calendar year for which he is selected may have ended.

History. Acts 1969, No. 568, §§ 3, 4; 1971, No. 364, § 1; 1983, No. 425, § 1; A.S.A. 1947, §§ 39-103, 39-104.

Cross References. Disqualification from further duty, § 16-32-107.

CASE NOTES

ANALYSIS

Frequency.
Jury wheel.

shown. *Norris v. State*, 262 Ark. 188, 555 S.W.2d 560 (1977), cert. denied, 435 U.S. 970, 98 S. Ct. 1610, 56 L. Ed. 2d 61 (1978).

Frequency.

Upon retrial, trial court properly refused to quash jury panel on grounds that two of the jury commissioners who selected the wheel of jurors had served on a petit jury within the preceding two years and had in fact served on the petit jury which convicted the defendant at his first trial, where no possibility of prejudice was

Jury Wheel.

There was no statutory exclusion from new jury wheel of jurors whose names were in the prior wheel which had been quashed. *Maxwell v. State*, 259 Ark. 86, 531 S.W.2d 468 (1976).

Cited: *Worley v. State*, 259 Ark. 433, 533 S.W.2d 502 (1976); *Ruiz v. State*, 265 Ark. 875, 582 S.W.2d 915 (1979).

16-31-105. Exemption from overtime parking penalties.

(a) No person shall be subject to a fine or other penalty for the offense of overtime parking incurred while the person is engaged in actual service as a grand or petit juror in any court, federal or state, in this state.

(b) The person may evidence the fact of jury service by exhibiting to the appropriate official of the city or town offended by the violation a certificate of the clerk of the court similar to the form now in use to the

effect that the person was engaged in jury service on the date of the violation and the hours of actual service.

(c) Any person attempting to enforce any fine or other penalty notwithstanding the provisions of this section shall be subject to contempt proceedings before the judge of the court being served by the person so charged.

(d) Nothing contained in this section shall be construed to give immunity from fine or penalty other than for the offense of overtime parking.

History. Acts 1971, No. 729, §§ 1-4; 1979, No. 423, § 1; A.S.A. 1947, §§ 39-117 — 39-120.

Publisher's Notes. Acts 1971, No. 364, § 1 and 1971, No. 729, §§ 3, 4 are also codified as § 16-10-131.

16-31-106. Penalty for employees' service prohibited.

(a)(1) Any person who is summoned to serve on jury duty shall not be subject to discharge from employment, loss of sick leave, loss of vacation time, or any other form of penalty as a result of his or her absence from employment due to jury duty, upon giving reasonable notice to his or her employer of the summons.

(2) No employer shall subject an employee to discharge, loss of sick leave, loss of vacation time, or any other form of penalty on account of his or her absence from employment by reason of jury duty.

(b) Any person violating the provisions of this section shall be guilty of a Class A misdemeanor.

History. Acts 1969, No. 568, § 3; 1983, No. 425, § 1; A.S.A. 1947, § 39-103.

CASE NOTES

Salary.

An employer is not legally required to pay an employee during her absence on jury duty. *Frolic Footwear, Inc. v. State*, 284 Ark. 487, 683 S.W.2d 611 (1985).

Cited: *Ruiz v. State*, 265 Ark. 875, 582 S.W.2d 915 (1979).

16-31-107. Effect of unqualified juror upon verdict or indictment.

No verdict or indictment shall be void or voidable because any juror shall fail to possess any of the qualifications required in this act unless a juror shall knowingly answer falsely any question on voir dire relating to his qualifications propounded by the court or counsel in any cause. A juror who shall knowingly fail to respond audibly or otherwise as is required by the circumstances to make his position known to the court or counsel in response to any question propounded by the court or counsel, the answer to which would reveal a disqualification on the part of the juror, shall be deemed to have answered falsely.

History. Acts 1969, No. 568, § 6; A.S.A. 1947, § 39-106.

Meaning of "this act". See note to § 16-31-101.

CASE NOTES

ANALYSIS

Applicability.

Affinity.

Burden of proof.

Duty of court.

Failure to question juror.

Failure to reveal disqualification.

Judgment valid.

Timely objection.

Applicability.

Former similar section applied to both criminal and civil cases. *Arkansas State Hwy. Comm'n v. Kennedy*, 233 Ark. 844, 349 S.W.2d 132 (1961) (decision under prior law).

Affinity.

There can be no affinity between the blood relations of the husband and the blood relations of the wife, and juror would not be disqualified to serve on the jury under this section because her in-laws were related to plaintiffs by marriage. *Farmers Bank v. Perry*, 301 Ark. 547, 787 S.W.2d 645 (1990).

Burden of Proof.

To obtain a new trial on the grounds of juror misconduct, a party must first demonstrate that a juror failed to honestly answer a question or deliberately concealed a matter during voir dire, and then further show that a correct response would have provided a valid basis for a challenge for cause. *Pineview Farms, Inc. v. A.O. Smith Harvestore, Inc.*, 298 Ark. 78, 765 S.W.2d 924 (1989).

In a hearing on a motion for a new trial because of ineligibility of a juror, the complaining party has the burden of first establishing that: (1) diligence was used to ascertain the desired information and (2) he made known to the juror the specific information desired. *Pineview Farms, Inc. v. A.O. Smith Harvestore, Inc.*, 298 Ark. 78, 765 S.W.2d 924 (1989).

Duty of Court.

A trial court is not required to disclose to counsel a juror's inability to read or write. *Arkansas La. Gas Co. v. Morgan*, 256 Ark. 250, 506 S.W.2d 560 (1974).

Failure to Question Juror.

A new trial will not be granted on account of the disqualification of a juror by reason of relationship to the appellee where the bill of exceptions (abolished) does not disclose that any questions were asked on voir dire as to the relationship of the jurors to the parties. *Fones Bros. Hdwe. Co. v. Mears*, 182 Ark. 533, 32 S.W.2d 313 (1930) (decision under prior law).

Where court reporter failed to take shorthand notes on juror's voir dire and court refused to let the record show that juror was questioned as to his relationship with plaintiff, or his denial of same, uncontroverted affidavits of the other jurors and bystanders were taken as being true by the Supreme Court. *Brundrett v. Thompson*, 203 Ark. 726, 159 S.W.2d 65 (1942) (decision under prior law).

Where the question asked the juror was not one in which the silence of the juror amounted to an answer, the appellant failed to show due diligence to determine grounds for disqualification of that juror. *Kane v. Erich*, 250 Ark. 448, 465 S.W.2d 327 (1971) (decision under prior law).

Although § 16-31-102(a)(5) disqualifies convicted felons from serving on a jury, where no juror was asked during voir dire whether he or she had been convicted of a felony, the trial court did not abuse his discretion in finding the juror, who had been convicted of a felony, did not knowingly answer falsely to any question on voir dire, and thus, the jury's verdict was not void or voidable under this section. *Zinger v. State*, 313 Ark. 70, 852 S.W.2d 320 (1993).

A juror's failure to admit during voir dire a business connection with the defendant's insured did not amount to juror misconduct warranting a new trial where the plaintiff did not use due diligence in seeking information concerning the juror's relationship to the defendant's insured. *Berry v. St. Paul Fire & Marine Ins. Co.*, 328 Ark. 553, 944 S.W.2d 838 (1997).

Failure to Reveal Disqualification.

Where a juror failed, upon questioning, to reveal his relationship to a witness for

the prosecution, and such relationship would have disqualified him, the defendant was entitled to a new trial. *Baysinger v. State*, 261 Ark. 605, 550 S.W.2d 445 (1977).

Although juror's apparently unintentional failure to disclose disqualifying information was not done knowingly, the trial court did not abuse its discretion in granting a new trial. *Arkansas Power & Light Co. v. Bolls*, 48 Ark. App. 23, 888 S.W.2d 319 (1994).

Judgment Valid.

Where juror did not meet qualifications because she was not a resident of county where the case was tried, but she did not knowingly answer falsely any question on voir dire relating to her qualifications, the verdict was not voidable. *Bennett v. State*, 308 Ark. 393, 825 S.W.2d 560 (1992).

Timely Objection.

A verdict in an action by a physician for professional services will not be set aside because of the relationship of a juror to

another physician who assisted in performing the services and was in some way interested in the result of the suit, where the relationship was known before the trial. *Arkansas S.R.R. v. Loughridge*, 65 Ark. 300, 45 S.W. 907 (1898) (decision under prior law).

An objection to an unqualified person's serving as a juror must have been made before he was sworn as a jurymen. *Arkansas State Hwy. Comm'n v. Bryant*, 233 Ark. 841, 349 S.W.2d 349 (1961) (decision under prior law).

It was too late after rendition of verdict to raise the ineligibility of a juror to serve unless it could be shown by the complaining party that diligence was used to ascertain his disqualification and to prevent his selection as a juror. *Arkansas State Hwy. Comm'n v. Kennedy*, 233 Ark. 844, 349 S.W.2d 132 (1961) (decision under prior law).

Cited: *Arkansas La. Gas Co. v. Morgan*, 256 Ark. 250, 506 S.W.2d 560 (1974).

16-31-108. Interpreters for visually or hearing impaired jurors.

(a)(1)(A) The state, through the Administrative Office of the Courts, shall provide and pay the cost of reasonable accommodations for the hearing and visually impaired when necessary to enable a person with those disabilities to act as a venireperson or juror.

(B) Such accommodations may include a qualified sign language interpreter, real-time captioning, or other reasonable auxiliary aid for the hearing impaired or a reader for the visually impaired.

(C) In the event the juror indicates that he or she can be accommodated by several means, the Administrative Office of the Courts may consider the cost and availability of each accommodation when deciding which to provide.

(2) The interpreter, the person writing real-time captioning, and the reader, when necessary, shall be present throughout jury service, the trial, and when the jury assembles for deliberation.

(b)(1) Whenever a sign language interpreter, real-time captioning, or a reader is utilized in judicial proceedings or in jury deliberations, the court will administer an oath to the interpreter, the person writing the real-time captioning, and the reader, to ensure objective and unbiased translation and complete confidentiality of the proceedings.

(2) The court shall also instruct the interpreter, the person writing the real-time captioning, and the reader to make a true and complete translation of all testimony and other relevant colloquy to the best of his ability.

(3) The court shall further instruct the interpreter, the person writing the real-time captioning, and the reader to refrain from

participating in any manner in the deliberations of the jury, except for the complete translations of jurors' remarks made during deliberations.

(c) The verdict of the jury shall be valid notwithstanding the presence of the interpreter during deliberations.

History. Acts 1994 (1st Ex. Sess.), No. 4, § 2; 1995, No. 897, § 1.

Amendments. The 1995 amendment substituted "reasonable accommodations for the hearing and visually impaired" for "reasonable services of, a qualified interpreter for the hearing impaired or a

reader for the visually impaired" in (a)(1); and rewrote current (a)(1)(B), (a)(1)(C), (a)(2) and (b).

Cross References. Court interpreters, § 16-10-127.

Method of procuring services, § 16-10-135.

CHAPTER 32

SELECTION AND ATTENDANCE

SUBCHAPTER

1. GENERAL PROVISIONS.
2. CRIMINAL PROCEEDINGS.

RESEARCH REFERENCES

Am. Jur. 47 Am. Jur. 2d, Jury, § 136 et seq.

Ark. L. Rev. Minimum Standards of Judicial Administration — Arkansas, 5 Ark. L. Rev. 1, 6.

Selection of Juries, 5 Ark. L. Rev. 384.
Arkansas Civil Juries, 21 Ark. L. Rev. 527.

The Arkansas Jury Wheel Act of 1969, 24 Ark. L. Rev. 43.

Gingerich, The Arkansas Grand Jury, Etc., 40 Ark. L. Rev. 55.

C.J.S. 50 C.J.S., Juries, § 155 et seq.

CASE NOTES

Venire.

Defendant failed to show he was prejudiced by the absence of black males on his jury panel where he failed to produce any evidence that showed black males were systematically excluded from the venire or

that the method used to assemble the venire produced a venire from which black males were systematically excluded. Gillie v. State, 305 Ark. 296, 808 S.W.2d 320 (1991).

SUBCHAPTER 1 — GENERAL PROVISIONS

SECTION.

- 16-32-101. Selection pursuant to act required — Waiver.
- 16-32-102. Jury commissioners.
- 16-32-103. Master list.
- 16-32-104. Jury wheel or box.
- 16-32-105. Drawing for petit jurors.
- 16-32-106. Summons of petit jurors.

SECTION.

- 16-32-107. Excess number of jurors drawn and listed.
- 16-32-108. Additional jurors.
- 16-32-109. Selection upon challenge by litigant.
- 16-32-110. Electronic random selection.

A.C.R.C. Notes. References to "this subchapter" in §§ 16-32-101 to 16-32-109 may not apply to § 16-32-110 which was enacted subsequently.

Effective Dates. Acts 1975, No. 485, § 7, provided: "This Act shall be effective on and after January 1, 1976, except that the procedures outlined in this Act to be carried out prior to the empaneling of a jury shall be effective on and after July 1, 1975, so that jurors empaneled at terms of any circuit court beginning after January 1, 1976 shall be selected as provided herein."

Acts 1979, No. 816, § 4: July 1, 1979. Emergency clause provided: "It is hereby found and determined by the General Assembly that the method of selecting jurors is vital to the proper administration of justice and that this Act is necessary to establish the most equitable method of such selection. Therefore, an emergency is hereby declared to exist and this Act being necessary for the preservation of the public peace, health and safety shall be in full force and effect from and after July 1, 1979."

Acts 1997, No. 1021, § 5: April 2, 1997. Emergency clause provided: "It is hereby found and determined by the General Assembly that the present method of selecting grand jurors and petit jurors is inadequate to assure random selection; that this act will provide for the random selection of jurors; and until this act becomes effective, the validity of findings and judgments issued by juries in this state is subject to question. Therefore, an emergency is declared to exist and this act being immediately necessary for the preservation of the public peace, health and safety shall become effective on the date of its approval by the Governor. If the bill is neither approved nor vetoed by the Governor, it shall become effective on the expiration of the period of time during which the Governor may veto the bill. If the bill is vetoed by the Governor and the veto is overridden, it shall become effective on the date the last house overrides the veto."

CASE NOTES

ANALYSIS

Construction.

Irregularities.

Construction.

Acts 1969, No. 568, must be construed as mandatory and not as directory only. *Horne v. State*, 253 Ark. 1096, 490 S.W.2d 806 (1973).

Irregularities.

While the provisions of the jury wheel act are mandatory, some sections of Acts 1969, No. 568 are more important than others, and any irregularity in the selection process does not per se invalidate the proceedings. *Abernathy v. Patterson*, 295 Ark. 551, 750 S.W.2d 406 (1988).

16-32-101. Selection pursuant to act required — Waiver.

No person shall be summoned to serve as a grand or petit juror who has not been selected under the provisions of this act unless this requirement is waived by the parties.

History. Acts 1969, No. 568, § 26; A.S.A. 1947, § 39-218.

Meaning of "this act". See note to § 16-32-104.

CASE NOTES

Applicability.

This section must be complied with in the selection of a special grand jury under

§ 16-85-517. *Streett v. Roberts*, 258 Ark. 839, 529 S.W.2d 343 (1975).

16-32-102. Jury commissioners.

(a) On or before November 1 of each year, the circuit judge shall appoint not less than three (3) nor more than twelve (12) jury commissioners who shall:

(1) Not be related to one another, or to the appointing judge, within the second degree of consanguinity or affinity;

(2) Possess the qualifications for petit jurors;

(3) Have no suits pending in the circuit courts;

(4) Not be directly or indirectly concerned with any pending criminal proceeding or prison investigation; and

(5) Not be related within the second degree of consanguinity or affinity to any elected county officer.

(b) The judge shall administer to the commissioners the following oath:

"You do swear faithfully to discharge the duties required of you as jury commissioners; that you will select jurors as provided by law from a cross section of the community which this court serves and you will not exclude or include any persons on account of race, religion, sex, national origin, or economic status; that you will not select any person as a juror who has solicited or had others to solicit that his name be placed on the jury list; that you will not make known to anyone the names of the prospective jurors that you select until after they have been notified by the court of their selection; and that you will not, directly or indirectly, converse with anyone selected by you as a juror concerning the merits of any proceeding pending, or likely to come before the grand jury or court until after the case is tried or otherwise finally disposed of."

(c) Jury commissioners shall receive ten dollars (\$10.00) per day for their services and ten cents (10¢) per mile from and to their homes by the most direct and practical route.

(d) No person shall be appointed as a jury commissioner who has served as a jury commissioner anywhere in the state within four (4) years of the date of appointment.

(e) If any commissioner shall become disqualified, die, or be executed, the judge, in his discretion, may appoint a successor commissioner.

(f) Any person who shall fail or refuse to attend and perform the duties required of a jury commissioner, without reasonable excuse, shall be fined not less than twenty-five dollars (\$25.00) nor more than five hundred dollars (\$500). However, nothing in this subsection shall be construed to limit the inherent powers of the court to punish for contempt.

CASE NOTES

Qualifications.

The requirement that jury commissioners must possess the qualifications prescribed for petit jurymen refers to the fact that petit jurors must be qualified electors of the county in which they may be summoned. *Arkansas State Hwy. Comm'n v. Sadler*, 248 Ark. 887, 454 S.W.2d 325 (1970) (decision under prior law).

Political party central committeemen for county are not officers in any sense

except to be answerable to mandamus proceedings and, therefore, they may serve as jury commissioners. *Arkansas State Hwy. Comm'n v. Roberts*, 250 Ark. 80, 464 S.W.2d 57 (1971) (decision under prior law).

Cited: *Miller v. Goodwin*, 246 Ark. 552, 439 S.W.2d 308 (1969); *Mosby v. State*, 249 Ark. 17, 457 S.W.2d 836 (1970).

16-32-103. Master list.

(a) During the month of November or December of each year, the prospective jurors for the following calendar year shall be selected from among the current list of registered voters of the applicable district or county in the following manner:

(1) The circuit judge, in the presence of the circuit clerk, shall select at random a number between one (1) and one hundred (100), inclusive, which shall be the starting number, and the circuit court shall then select the person whose name appears on the current voter registration list in that numerical position, counting sequentially from the first name on the list;

(2) The circuit clerk shall then select the one hundredth voter registrant appearing on the list after the starting number. As an example, if the starting number is sixty-seven (67), which is the first selection, the second selection would be the one hundred sixty-seventh registered voter, the third selection would be the two hundred sixty-seventh registered voter, and so forth until the current registered voter list is exhausted; and

(3) The circuit judge and the circuit clerk shall then repeat the random selection process until the number of jurors set out in this subsection have been selected.

(b) The number of persons to be selected shall be based upon the number of qualified registered voters in the appropriate district or county as reflected by the current list of registered voters provided by the county clerk under legal requirements and, unless a larger number is designated by the circuit judge, the minimum number selected shall be as follows:

Number of Registered Voters	Minimum Number of Prospective Petit Jurors	Minimum Number of Prospective Grand Jurors
90,000 or more	1,200	120
16,000 to 89,999	1,000	100
10,000 to 15,999	800	90

Number of Registered Voters	Minimum Number of Prospective Petit Jurors	Minimum Number of Prospective Grand Jurors
6,000 to 9,999	600	75
2,000 to 5,999	500	75
0 to 1,999	250 or 50% of the registered voters, whichever is smaller	

(c) After the list of prospective jurors has been submitted by the circuit clerk, the circuit judge may, in the exercise of his discretion, authorize clerical assistance in preparing the alphabetized master list and separate cards, chips, disks, or other appropriate means of including the names and addresses of the prospective jurors in the wheel or box.

(1) The expense of this clerical help shall be paid by the county as an expense of the administration of justice.

(2) Clerical employees shall take the following oath:

"I will not make known to anyone the names of the prospective jurors who have been selected and I will not, directly or indirectly, converse with anyone selected as a juror concerning the merits of any proceeding pending or likely to come before the grand jury or court until after the case is tried or otherwise finally disposed of."

(d) Subsections (a)-(c) of this section shall be applicable to all circuit courts and counties within the state.

(e) All circuit clerks who maintain voter registration lists on computers, whether in-house or contracted, may utilize the computers and associated equipment for the purpose of selecting jury panels from the voter registration lists. The master list of jurors' names and addresses shall not be available for public inspection, publication, or copying, but it may be examined in the presence of the circuit judge by litigants or their attorneys who desire to verify that names drawn from the wheel or box were placed there in the manner provided in this act by the commissioners.

History. Acts 1969, No. 568, § 15; 1975, No. 485, § 2; 1979, No. 816, §§ 1, 2; 1981, No. 687, § 1; 1985, No. 1066, § 1; A.S.A. 1947, §§ 39-205.1, 39-205.1n, 39-205.2, 39-207.

Meaning of "this act". See note to § 16-32-104.

CASE NOTES

ANALYSIS

Constitutionality.

Construction.

Discrimination.

Multi-district county.

Oath.

Sufficient compliance.

Violation.

Constitutionality.

This section is constitutional. *Richardson v. Williams*, 327 Ark. 156, 936 S.W.2d 752 (1997).

Construction.

Acts 1969, No. 568 must be construed as mandatory for to construe it as directory only would tend to exclude from jury service those voters who registered after the last full selection of the jury wheel. *Horne v. State*, 253 Ark. 1096, 490 S.W.2d 806 (1973).

This section is so clear that it needs no construction or interpretation, even though it contains a typographical error; it is a well-thought-out statute, has a solid foundation in public policy, and is to be followed by the circuit judges and clerks. *Bates v. State*, 322 Ark. 738, 912 S.W.2d 417 (1995).

Discrimination.

Where there was a 14% disparity between the percentage of blacks on the jury venire and the percentage of registered black voters and the jury venire was chosen by the subjective judgment of white jury commissioners who could exercise untrammelled discretion subject only to the requirement that persons selected be of good moral character, of approved integrity, sound judgment and reasonable information, a prima facie case of discrimination was established. *Sanford v. Hutto*, 394 F. Supp. 1278, aff'd, 523 F.2d 1383 (8th Cir. 1975) (decision under prior law).

No defendant has a right to have jurors selected in a manner to assure him of a jury from his own ethnic group or occupation. *Turner v. State*, 258 Ark. 425, 527 S.W.2d 580 (1975) (decision under prior law).

To the extent that persons not registered to vote did not constitute a distinct and identifiable group, use of voter registration lists in the overall composition of

petit and grand juries did not discriminate against unregistered citizens. *Murrah v. Arkansas*, 532 F.2d 105 (8th Cir. 1976) (decision under prior law).

Evidence insufficient to show that the Arkansas system of selecting jurors at random from the current list of registered voters unlawfully underrepresented blacks and persons between the ages of eighteen and thirty-four. *Sullivan v. State*, 287 Ark. 6, 696 S.W.2d 709 (1985).

When the panel is drawn by chance, a showing that its racial make-up does not correspond to that of the county does not in itself make a prima facie case of racial discrimination; therefore, the defendant's motion for a continuance to enable him to show that the particular panel was not representative of the population was properly refused. *Thomas v. State*, 289 Ark. 72, 709 S.W.2d 83 (1986).

This process of selecting jurors has been upheld frequently and while jury selection may not be the result of discrimination against racial groups, each jury need not have on it persons representative of each distinctive group in the population from which it is chosen; thus a jury of 15% African-Americans in county where the African-American population is 23% did not show purposeful discrimination. *MacKintrush v. State*, 334 Ark. 390, 978 S.W.2d 293 (1998).

Multi-District County.

Where jury was drawn only from one district of multi-district county, the trial court properly refused to grant motion quashing the jury panel since Ark. Const., Art. 13, § 5, and this section both clearly contemplate that a jury may properly be drawn from only one district within a county having more than one district. *Morgan v. State*, 273 Ark. 252, 618 S.W.2d 161 (1981).

The electoral subdistricts within the Tenth Judicial District are not judicial districts and that the venire in this case was properly drawn from Drew County as a whole. *Caldwell v. State*, 322 Ark. 543, 910 S.W.2d 667 (1995), cert. denied, 517 U.S. 1124, 116 S. Ct. 1361, 134 L. Ed. 2d 528 (1996).

Oath.

The trial court properly refused to quash the jury panel merely because a

clerical employee who assisted in preparing the jury list had not taken the oath required by this section, since this section is not mandatory and no question about the integrity of the list had been shown. *Williams v. State*, 278 Ark. 9, 642 S.W.2d 887 (1982).

Sufficient Compliance.

Where the bailiff testified that he put the names in alphabetical order as a convenience to help him in locating the jurors and to help attorneys in matching the names with the jurors' information sheets, where the alphabetical listing was just as random and impartial as any other procedure, and where there was no hint that alphabetical order was chosen for a sinister purpose, in the absence of any showing whatever of possible prejudice, the trial judge was right in denying the motion to quash the panel. *Welch v. State*, 269 Ark. 208, 599 S.W.2d 717, cert. denied, 449 U.S. 996, 101 S. Ct. 535, 66 L. Ed. 2d 294 (1980).

The fact that jurors were called for a particular term of court rather than for the calendar year in general did not offend the spirit of this section. *Harrod v. State*, 286 Ark. 277, 691 S.W.2d 172 (1985).

Jury selection satisfied requirements of this section. *Sanders v. State*, 300 Ark. 25, 776 S.W.2d 334 (1989).

The trial court erred by selecting the random numbers outside the presence of the circuit clerk and by not being present when the selection was made, but the error was harmless where there was no hint that the circuit judge did anything other than randomly select the numbers,

and there was no hint that the circuit clerk did anything other than correctly apply the random numbers to the voter registration list. *Bates v. State*, 322 Ark. 738, 912 S.W.2d 417 (1995).

Violation.

In a civil tort proceeding, the plaintiff has an equal protection right to jury-selection procedures that produce juries from a representative cross-section of his community; however, in order to establish a prima facie violation of the cross-section requirement, he must show (1) that the group alleged to be excluded is a "distinctive" group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this underrepresentation is due to systematic exclusion of the group in the jury-selection process. *Richardson v. Williams*, 327 Ark. 156, 936 S.W.2d 752 (1997).

Cited: *Williams v. State*, 254 Ark. 799, 496 S.W.2d 395 (1973); *Robillard v. State*, 263 Ark. 666, 566 S.W.2d 735 (1978); *Walton v. State*, 279 Ark. 193, 650 S.W.2d 231 (1983); *Brown v. Lockhart*, 781 F.2d 654 (8th Cir. 1986); *Abernathy v. Patterson*, 295 Ark. 551, 750 S.W.2d 406 (1988); *Gardner v. State*, 296 Ark. 41, 754 S.W.2d 518 (1988); *Mitchell v. State*, 299 Ark. 566, 776 S.W.2d 332 (1989); *Wainwright v. Norris*, 872 F. Supp. 574 (E.D. Ark. 1994); *Davis v. State*, 325 Ark. 194, 925 S.W.2d 402 (1996); *Britt v. State*, 334 Ark. 142, 974 S.W.2d 436 (1998).

16-32-104. Jury wheel or box.

(a) The names and last known addresses of the persons selected shall be placed, in the presence of the circuit judge and the circuit clerk, in a circular hollow wheel or a large box constructed of sturdy and durable material. In place of names and addresses, the court may cause cards or discs, numbered serially, to reflect the number of prospective jurors required to be placed in the box and shall cause the names on the master list to be numbered serially so that a juror on the list may be identified when his number is drawn for entry in the jury book.

(b)(1) The wheel or box shall thereafter remain locked at all times, except when in use as provided in this subchapter, by the use of two (2) separate locks, so arranged that the key to one will not open the other lock. The clasps into which the locks shall be fitted shall be so arranged that the wheel or box cannot be opened unless both locks are unlocked.

(2) The key to one (1) lock shall be kept by the circuit judge, and the key to the other shall be kept by the circuit clerk.

(3) The circuit clerk of each county shall keep the wheel or box, when not in use, in a safe and secure place.

(c) Whenever the circuit judge finds that there is sufficient reason to believe that the integrity of the contents of the wheel or box may have been compromised, he shall cause the names in the wheel or box to be compared with the names on the master list; and the verified names shall then be placed in the wheel or box in open court.

(d) Any person other than one acting in open court as authorized by this act who shall open a jury wheel or box with intent to remove, alter, or add to its contents shall be deemed guilty of a felony, and upon conviction shall be imprisoned in the penitentiary not less than one (1) year nor more than twenty-one (21) years.

History. Acts 1969, No. 568, §§ 14, 16, 27; A.S.A. 1947, §§ 39-206, 39-208, 39-219.

Meaning of "this act". Acts 1969, No.

568, codified as §§ 16-30-101, 16-30-103, 16-31-101 — 16-31-104, 16-31-106, 16-31-107, 16-32-101 — 16-32-104, 16-32-106, 16-32-107, 16-32-109.

CASE NOTES

Special Grand Jury.

The jury wheel method of selection is mandatory when a special grand jury is selected under § 16-85-517. *Streett v. Roberts*, 258 Ark. 839, 529 S.W.2d 343 (1975).

Cited: *Arkansas State Hwy. Comm'n v. Sadler*, 248 Ark. 887, 454 S.W.2d 325

(1970); *Mosby v. State*, 249 Ark. 17, 457 S.W.2d 836 (1970); *Williams v. State*, 254 Ark. 799, 496 S.W.2d 395 (1973); *Shelton v. State*, 254 Ark. 815, 496 S.W.2d 419 (1973); *Walton v. State*, 279 Ark. 193, 650 S.W.2d 231 (1983); *Brown v. Lockhart*, 781 F.2d 654 (8th Cir. 1986).

16-32-105. Drawing for petit jurors.

(a) After the names have been placed in the wheel or box and not less than fifteen (15) days prior to the first jury trial in the year for which the prospective jurors have been selected, the circuit judge shall enter an order which shall be spread of record stating a time and place for the initial drawing for the names of petit jurors from the wheel or box.

(b) At the time and place designated, the wheel or box shall be unlocked in open court.

(c) After the names have been thoroughly mixed, the circuit judge shall cause to be drawn the number of names which, in his opinion, shall be necessary to provide a panel of qualified petit jurors for the trial of cases, after excuses from attendance have been granted to those who are entitled to be excused.

(d) As the names are drawn, they shall be recorded in the same order by the circuit clerk in a book to be provided for that purpose, and, if the name of any person known to have died or found by the court upon inquiry to be unfit and disqualified under § 16-31-102(a) is drawn, that name shall be put aside and not used and a notation of the discarding of the name and reason therefor shall be made in the jury book.

(e) The same procedures outlined in this section shall be followed in the event all of the jurors whose names are listed in the jury book shall be excused from further service.

History. Acts 1975, No. 485, § 3; A.S.A. 1947, § 39-209.1.

CASE NOTES

ANALYSIS

Construction.
Alternative procedure.
Discrimination.
Entry of names in jury book.

Construction.

This section, on its face, does not require the presence of the judge when the names are drawn. *Marshall v. State*, 316 Ark. 753, 875 S.W.2d 814 (1994).

Alternative Procedure.

Where the bailiff testified that he put the names in alphabetical order as a convenience to help him in locating the jurors and to help attorneys in matching the names with the jurors' information sheets, where the alphabetical listing was just as random and impartial as any other procedure, and where there was no hint that alphabetical order was chosen for a sinister purpose, in the absence of any showing whatever of possible prejudice, the trial judge was right in denying the motion to quash the panel. *Welch v. State*, 269 Ark. 208, 599 S.W.2d 717, cert. denied, 449 U.S. 996, 101 S. Ct. 535, 66 L. Ed. 2d 294 (1980).

Discrimination.

Fact that one of three jury commissioners testified that in selection of jurors he partly took into consideration whether selection of certain jurors would cause a hardship on them was not sufficient to establish that wage earners were systematically and unconstitutionally excluded from the jury so as to deprive defendant of a jury of his social and economic peers. *Kimble v. State*, 246 Ark. 407, 438 S.W.2d 705 (1969) (decision under prior law).

An accused in Arkansas has never had the right to have the jury commissioners select jurors in such a manner as to assure the accused of a jury from his own ethnic group or occupation. *Pointer v. State*, 248 Ark. 710, 454 S.W.2d 91 (1970), cert. de-

nied, 400 U.S. 959, 91 S. Ct. 359, 27 L. Ed. 2d 268 (1970) (decision under prior law).

Where the panel is drawn by chance from a jury wheel made up from a list of names taken from voter registration lists by jury commissioners appointed in accordance with statute and who were properly instructed to select jurors from a representative cross section of a county without discrimination as to race, the mere showing that the composition of a particular jury panel did not correspond to the racial makeup of the community did not in and of itself make a prima facie case of racial discrimination. One attacking the jury panel must show that there has been systematic and intentional exclusion of any particular group before the panel can be quashed on that account. *Turner v. State*, 258 Ark. 425, 527 S.W.2d 580 (1975) (decision under prior law).

Entry of Names in Jury Book.

Where names were withdrawn from the jury wheel for use by the chancery court, but had never been entered in the jury book, it was error not to quash the jury panel. *Shelton v. State*, 254 Ark. 815, 496 S.W.2d 419 (1973) (decision under prior law).

Where names of prospective jurors were recorded by circuit clerk on yellow legal pad instead of in jury book as required by this section, trial court properly denied defendant's motion to quash the jury panel because the motion was not timely presented at the pretrial conference but rather on the day of the trial. *Beasley v. State*, 258 Ark. 84, 522 S.W.2d 365 (1975) (decision under prior law).

The defendant was not prejudiced by the court clerk's practice of making a typewritten list of the names of jurors rather than recording the names in a jury book, where the typewritten list had been used all during that term of court and where defendant's objection to the list was not made until the morning of the trial.

Huckaby v. State, 262 Ark. 413, 557 S.W.2d 875 (1977) (decision under prior law).

This section requires that the names be recorded in the jury book in the same order as they are drawn, but it does not specify the order in which they are to be summoned. *Welch v. State*, 269 Ark. 208, 599 S.W.2d 717, cert. denied, 449 U.S. 996, 101 S. Ct. 535, 66 L. Ed. 2d 294 (1980) (decision under prior law).

The failure to list the names in the jury

book of the twenty-three veniremen who were excused from serving as jurors, or to record the reasons for their excusal, was not reversible error where the names were recorded in a file retained by the clerk, as well as the reasons for excusal in all but a single instance, on individual questionnaires, which were also kept in a separate file. *Harrod v. State*, 286 Ark. 277, 691 S.W.2d 172 (1985).

Cited: *Brown v. Lockhart*, 781 F.2d 654 (8th Cir. 1986).

16-32-106. Summons of petit jurors.

(a) The persons whose names have been drawn and recorded in the petit jury book shall be summoned to appear on a date set by the court to answer questions concerning their qualifications and, unless excused or disqualified, to serve the required number of days or for the maximum period during the calendar year for which selected unless sooner discharged.

(b) Jurors shall be summoned by the sheriff by:

- (1) A notice dispatched by first-class mail; or
- (2) Notice given personally on the telephone; or
- (3) Service of summons personally or by such other method as is permitted or prescribed by law.

(c)(1) If a notice is dispatched by first-class mail, the prospective jurors shall be given a date certain to call the sheriff to confirm receipt of the notice. Not later than five (5) days before the prospective juror is to appear, the sheriff shall call the prospective juror if the prospective juror has failed to acknowledge receipt of the notice.

(2) A notice dispatched by first-class mail shall include the following language:

"You are hereby notified that you have been chosen as a prospective juror. You must call the sheriff on or before(date)to confirm that you have received this notice. If you do not call the sheriff to confirm this notice, the sheriff will contact you and there will be added cost. Please call the sheriff at(phone number)"

(d) Unless excused by the circuit judge, a juror who has been legally summoned and who shall fail to attend on any date when directed to do so may be fined in any sum not less than five dollars (\$5.00) nor more than five hundred dollars (\$500). However, nothing in this subsection shall be construed to limit the inherent power of the court to punish for contempt. All excuses granted by the circuit judge shall be noted in the jury book.

History. Acts 1969, No. 568, §§ 18, 19; A.S.A. 1947, §§ 39-210, 39-211; Acts 1989, No. 892, § 1.

Cross References. Alternate jurors authorized, § 16-30-102.

CASE NOTES

ANALYSIS

Borrowing jurors.
Method of summons.

Borrowing Jurors.

It was proper for the chancery court to borrow jurors for trial of issues in equity as long as the jurors were taken from the jury book and returned to it for use in future trials. *Shelton v. State*, 254 Ark. 815, 496 S.W.2d 419 (1973) (decision under prior law).

Method of Summons.

Once trial was in progress, the trial judge was within his discretion in approving the most expeditious method of summoning additional prospective jurors, regardless of defendant's claim that the sheriff's use of the telephone to summon more jurors systematically excluded a large class of jurors. *Huckaby v. State*, 262 Ark. 413, 557 S.W.2d 875 (1977).

Although this section authorizes summoning of prospective jurors by telephone,

it was reversible error for the trial court to permit telephone summoning of jurors only four hours prior to trial, especially where only about one-third of the prospective jurors could be so reached in time. *Kitchen v. State*, 264 Ark. 579, 572 S.W.2d 839 (1978).

Where, *inter alia*, the defendant failed to show that he was prejudiced by the fact that the jurors were summoned by ordinary mail and not by certified mail as required by this section, any error in the jury selection process was properly considered harmless. *Berna v. State*, 282 Ark. 563, 670 S.W.2d 434 (1984), cert. denied, 470 U.S. 1085, 105 S. Ct. 1847, 85 L. Ed. 2d 145 (1985).

Subdivision (c)(1) does not require five-days' notice to jurors, but only requires that if no confirmation is given, the sheriff must follow up with a telephone call to the nonresponsive panel member not later than five days before trial. *King v. State*, 312 Ark. 89, 847 S.W.2d 37 (1993).

16-32-107. Excess number of jurors drawn and listed.

(a) Whenever it shall appear that the names of more jurors have been drawn and listed in the jury book than are needed for jury service at the current or at any subsequent session of the court, the judge, if the jurors are present in court, shall designate the number of jurors required, the names of whom shall be taken from the jury book in the same order as they appear thereon.

(b) If the jurors are not present in court, the judge shall direct the sheriff to summon the number of jurors needed, the names of whom shall be taken from the jury book in the same order as they appear thereon, exempting those who have been excused from attendance.

(c) Persons whose names are drawn and recorded in the jury book shall not be disqualified from further duty as provided for in § 16-31-104(a) until they have been required to report for jury service and sworn therefor.

History. Acts 1969, No. 568, § 21; 1985, No. 1066, § 2; A.S.A. 1947, § 39-213.

CASE NOTES

Preparation of List.

Even though defendant failed to demonstrate prejudice where the trial court prepared a list of jurors which excluded not

only those persons excused from duty but also those persons who failed to appear at a prior impaneling of the jury or to answer the questionnaire and who had not been

served in order to avoid the expense and time of calling jurors who had not responded to their call to duty, it is a better practice for the trial courts to follow the method of jury selection prescribed in the

Arkansas Jury Wheel Act. *Henry v. State*, 29 Ark. App. 5, 775 S.W.2d 911 (1989).

Cited: *Shelton v. State*, 254 Ark. 815, 496 S.W.2d 419 (1973).

16-32-108. Additional jurors.

(a) If at any time it appears that a sufficient number of qualified jurors are not available to try scheduled cases, additional names may be drawn and recorded in the jury book in open court. These jurors shall be summoned as provided in § 16-32-106(a) and (b).

(b) The circuit judge may, at any time, in the exercise of his discretion, direct the jury commissioners who selected the original names placed in the wheel or jury box, or new commissioners designated by him, to meet and submit the names and last known addresses of additional registered voters whom the commissioners shall select in the manner provided by § 16-32-103(a)-(d). These names and addresses shall be placed by the commissioners within the wheel or box when it is next unlocked in open court and prior to any additional drawing of jurors, and a master list shall be presented to the court as provided in § 16-32-103(a)-(d).

History. Acts 1975, No. 485, § 4;
A.S.A. 1947, § 39-212.1.

CASE NOTES

ANALYSIS

Discretion of court.
Maintenance of names.
Special venire.

Discretion of Court.

No abuse of discretion found when trial judge did not call additional jurors. *Logan v. State*, 300 Ark. 35, 776 S.W.2d 341 (1989).

Maintenance of Names.

There is no requirement that the minimum number of names be constantly maintained after the original panel has been drawn from it. *Worley v. State*, 259 Ark. 433, 533 S.W.2d 502 (1976).

Special Venire.

Where jury panel had been selected to try another case dependent on the same facts, when the defendant's case was called for trial and the other members of the regular panel were either engaged in the trial of another case or were excused for cause, it was not an abuse of discretion to call a special venire. *Rose v. State*, 178 Ark. 980, 13 S.W.2d 25 (1929) (decision under prior law).

Cited: *Marshall v. State*, 316 Ark. 753, 875 S.W.2d 814 (1994).

16-32-109. Selection upon challenge by litigant.

(a)(1) A challenge to the use of the names selected by the jury commissioners and placed in the jury wheel or box for the drawing of trial panels therefrom may be made only by a litigant in a particular case.

(2) If the trial judge sustains the challenge to the use of names in the jury wheel or box for the drawing of trial jurors, he shall appoint a jury

commission of not less than three (3) persons, qualified and sworn as commissioners as provided by law, to select such a number of persons as the judge may designate from the current voter registration list in the manner provided by § 16-32-103(a)-(d). The list of persons, upon being summoned, shall constitute the panel of jurors for the trial of the cause.

(3) If the panel is exhausted prior to the formation of the trial jury for any reason, the commissioners shall be reconvened and additional names selected as provided in this section and placed on the list to be summoned as special jurors in such numbers as is deemed necessary to complete the jury for the trial of the cause.

(b)(1) A challenge to the jury drawn from the jury wheel or box may be made by a litigant in a particular case and shall be sustained by the court if it shall appear that there was a substantial irregularity in the drawing or summoning of the jury.

(2) In such a case, the court shall order, in open court, another panel drawn for the trial of the case and other cases in which a similar challenge is sustained.

History. Acts 1969, No. 568, § 23; 1975, No. 485, § 5; A.S.A. 1947, §§ 39-214.1, 39-215.

CASE NOTES

ANALYSIS

Challenge.

Method of selection.

Recusal of judge.

Summons.

Challenge.

Failure to present testimony in support of motion to quash jury panel, prior to jury's being sworn to try the case, on ground that jury commissioners allowed race to be factor in its determination of qualified jurors, waived right to challenge jury. *Johnson v. State*, 238 Ark. 15, 377 S.W.2d 865 (1964), cert. denied, 379 U.S. 948, 85 S. Ct. 444, 13 L. Ed. 2d 545 (1965) (decision under prior law).

Evidence did not support claim that panel failed to constitute a reasonable cross section of the community. *Harper v. State*, 249 Ark. 1013, 462 S.W.2d 847 (1971); *Mosby v. State*, 253 Ark. 904, 489 S.W.2d 799 (1973) (preceding decisions under prior law).

Summoning of wrong juror through inadvertent error and writing of names on a yellow legal pad before transfer to the jury book were trivial errors and did not amount to such substantial irregularities as to be a basis for a challenge to the

entire jury. *Cassell v. State*, 273 Ark. 59, 616 S.W.2d 485 (1981).

Method of Selection.

Discharge of original jury panel because of willful exclusion of blacks and selection of special panel by resummoning all but six of the quashed panel as new jurors, plus selection of six blacks because of their race, was improper, since members of jury must be selected as individuals on basis of individual qualifications and not included or excluded as members of a race. *Thomas v. State*, 238 Ark. 201, 379 S.W.2d 26 (1964) (decision under prior law).

Where commissioners were instructed to replace only the number of names used in the previous year, the deviation was prejudicial to the accused. *Horne v. State*, 253 Ark. 1096, 490 S.W.2d 806 (1973).

The number of persons to be selected by newly appointed jury commissioners to constitute the panel for the trial of a case after the jury wheel has been quashed is within the discretion of the trial judge. *Maxwell v. State*, 259 Ark. 86, 531 S.W.2d 468 (1976); *Harris v. State*, 259 Ark. 187, 532 S.W.2d 423 (1976) (preceding decisions under prior law).

Where three names appeared both in

the original jury wheel which was quashed and in the new wheel, and where one of the three persons was seated after defendant exhausted all his peremptory challenges, defendant was not entitled to reversal of his conviction, since there was no statutory exclusion from the new wheel of jurors whose names were in the prior wheel. *Maxwell v. State*, 259 Ark. 86, 531 S.W.2d 468 (1976) (decision under prior law).

In a criminal prosecution, it was not error for the trial court to draw ten jurors from the panel of jurors selected for the civil division. *Hewell v. State*, 261 Ark. 762, 552 S.W.2d 213 (1977).

Recusal of Judge.

The judge's selection of a new jury commission subsequent to his disqualification

was prejudicial error, for after his voluntary disqualification, the judge lost jurisdiction of the case and was without authority to act further in any judicial capacity except to make proper transfer of the case or take the appropriate steps for the selection of another judge. *Bolden v. State*, 262 Ark. 718, 561 S.W.2d 281 (1978).

Summons.

Although § 16-32-106 authorizes summoning of prospective jurors by telephone, it was reversible error for the trial court to permit telephone summoning of jurors only four hours prior to trial, especially where only about one-third of the prospective jurors could be so reached in time. *Kitchen v. State*, 264 Ark. 579, 572 S.W.2d 839 (1978).

16-32-110. Electronic random selection.

Beginning January 1, 1998, and thereafter, during every step in the procedure for the selection of grand jurors and petit jurors, electronic devices or mechanical devices shall be utilized to assure the random selection of all jury panels.

History. Acts 1997, No. 1021, § 1.

A.C.R.C. Notes. References to "this subchapter" in §§ 16-32-101 to 16-32-109

may not apply to this section which was enacted subsequently.

SUBCHAPTER 2 — CRIMINAL PROCEEDINGS

SECTION.

16-32-201. Selection of grand jury.

16-32-202. Selection, summons, and composition of trial generally.

SECTION.

16-32-203. Selection for misdemeanor trial.

Effective Dates. Acts 1975, No. 485, § 7, provided: "This Act shall be effective on and after January 1, 1976, except that the procedures outlined in this Act to be carried out prior to the empaneling of a jury shall be effective on and after July 1, 1975, so that jurors empaneled at terms of any circuit court beginning after January

1, 1976 shall be selected as provided herein."

Publisher's Notes. Acts 1993, No. 592, codified at §§ 16-32-202 and 16-32-203, was declared unconstitutional in *Byrd v. State*, 317 Ark. 609, 879 S.W.2d 435 (1994).

16-32-201. Selection of grand jury.

(a) The selecting, summoning, and impaneling of a grand jury shall be as prescribed by law.

(b) Circuit courts to which criminal cases are assigned may call grand jurors from the wheel or box from which petit jurors are drawn, or the circuit judge may direct the jury commissioners to provide the minimum number of names for a separate grand jury wheel or box in the minimum number set forth in § 16-32-103(a)-(d). In the event the circuit judge directs the jury commissioners to provide the minimum number of names for a separate grand jury wheel or box, the jury commissioners shall select the names of persons whom they believe to be qualified from the current voter registration list.

(c) In either event, when a grand jury is selected, the names of a sufficient number of persons shall be drawn from the appropriate box or wheel to provide a panel of sixteen (16) qualified grand jurors, plus a reasonable number of alternates, after excuses from attendance have been granted to those who are entitled to be excused.

(d) As the names are drawn, they shall be recorded in the grand jury book, and the grand jurors shall be summoned and directed to appear in the same manner as provided for petit jurors.

(e) The grand jury shall be made up of the first sixteen (16) persons summoned whose names appear as grand jurors in the jury book after the elimination of the disqualified or excused persons.

(f) The remaining grand jurors whose names appear in the jury book after the elimination of disqualified or excused persons shall be considered as alternates and shall be designated in the order as they appear in the jury book to replace regular grand jurors who become incapacitated or who are unavailable. Alternate grand jurors shall not be disqualified from further jury duty as provided in § 16-31-104 until they have been required to report for grand jury service during the year.

(g) Grand jurors shall serve during the calendar year in which selected unless sooner discharged by the court.

History. Crim. Code, § 98; C. & M. Dig., § 2977; Pope's Dig., § 3799; Acts 1975, No. 485, § 6; A.S.A. 1947, §§ 39-217.1, 43-901.

Cross References. Qualifications of grand jurors, § 16-31-101.

CASE NOTES

ANALYSIS

In general.
Discrimination.
Method of selection.
Objections.
Presumption.

In General.

Grand jury may be lawfully selected pursuant to statutory provisions or where the circuit court causes them to be selected in the exercise of its inherent constitutional right. *Rowland v. State*, 213 Ark. 780, 213 S.W.2d 370 (1948), cert.

denied, 336 U.S. 918, 69 S. Ct. 641, 93 L. Ed. 1081.

Discrimination.

It is error not to permit accused black to show discrimination against his race in selection of grand jury. *Castleberry v. State*, 69 Ark. 346, 63 S.W. 670 (1901).

Evidence that a grand jury contained but one black, no women, no one under fifty years of age, and that all but one were business men or retired persons, and that all were college graduates or had some college training, was evidence that discrimination against the excluded groups

was practiced in the selection of the grand jury and that the grand jury was unconstitutionally selected. *Jewell v. Stebbins*, 288 F. Supp. 600 (E.D. Ark. 1968) (decision under prior law).

Method of Selection.

A motion to quash on the grounds that a juror was sworn under a different name than appeared on the jury list was properly refused where the court found that the juror was the same person selected by the commissioners. *Boles v. State*, 58 Ark. 35, 22 S.W. 887 (1893).

Objections.

Objections to the organization of the grand jury must be made by motion to set aside the indictment; by pleading to the indictment, the illegality of the grand jury is waived. *Wright v. State*, 42 Ark. 94 (1883); *Carpenter v. State*, 62 Ark. 286, 36 S.W. 900 (1896).

Any alleged illegal discrimination in the selection and impaneling of the grand jury will be raised by a motion to quash. *Rowland v. State*, 213 Ark. 780, 213 S.W.2d 370 (1948), cert. denied, 336 U.S. 918, 69 S. Ct. 641, 93 L. Ed. 1081 (decision under prior law).

Presumption.

When the record discloses that persons named were duly impaneled as grand jury, it will be presumed, in the absence of a contrary showing, that the other persons who were summoned but did not serve as grand jurors were excused for cause; presumption is that grand jury was properly constituted. *Wallis v. State*, 54 Ark. 611, 16 S.W. 821 (1891); *Bates v. State*, 60 Ark. 450, 30 S.W. 890 (1895).

Cited: *Abernathy v. Patterson*, 295 Ark. 551, 750 S.W.2d 406 (1988).

16-32-202. Selection, summons, and composition of trial generally.

(a) The jurors for the trial of criminal prosecutions shall be selected and summoned as provided by law.

(b)(1) Juries shall be composed of twelve (12) jurors.

(2) However, cases other than felonies may be tried by a jury of fewer than twelve (12) jurors by agreement of the parties.

History. *Crim. Code*, § 191; *C. & M. Dig.*, § 3142; *Pope's Dig.*, § 3977; *A.S.A.* 1947, § 43-1901; *Acts* 1993, No. 592, § 1; 1995, No. 1296, § 61.

Publisher's Notes. This section, as amended by *Acts* 1993, No. 592, § 1, was declared unconstitutional in *Byrd v. State*, 317 Ark. 609, 879 S.W.2d 435 (1994). The court declared that the pre-amendment version remains viable and extant.

Amendments. The 1993 amendment redesignated the first and second sen-

tences in (a) as (a)(1) and (a)(2); and substituted "in the discretion of the trial court judge, by a jury of six (6) jurors," for "by a jury of less than twelve (12) jurors by agreement of the parties" in (b).

The 1995 amendment redesignated former (a)(1), (a)(2) and (b) as (a), (b)(1) and (b)(2), respectively; and substituted "by a jury of less than twelve (12) jurors by agreement of the parties" for "in the discretion of the trial court judge, by a jury of six (6) jurors" in present (b)(2).

RESEARCH REFERENCES

Ark. L. Rev. Note, *Constitutional Law* — Twelve Angry People. *Arkansas Constitution Guarantees Right to Trial by Jury of Twelve Persons in Criminal Cases*. *Byrd v. State*, 317 Ark. 609, 879 S.W.2d 435 (1994), 18 UALR L.J. 489.

UALR L.J. Sullivan, *An Overview of the Law of Jury Selection for Arkansas Criminal Trial Lawyers*, 15 UALR L.J. 37.

Seventeenth Annual Survey of Arkansas Law — Constitutional Law, 17 UALR L.J. 450.

CASE NOTES

ANALYSIS

Constitutionality.
Agreement.
Composition.
Right to twelve jurors.

Constitutionality.

The 1993 amendment of this section and § 16-32-203, which provided for a jury of six persons at the trial court's discretion, violates Ark. Const., Art. 2, § 7. *Byrd v. State*, 317 Ark. 609, 879 S.W.2d 435 (1994).

This section and § 16-32-203, as they existed prior to the enactment of Acts 1993, No. 592, remain viable and extant. *Byrd v. State*, 317 Ark. 609, 879 S.W.2d 435 (1994).

Agreement.

By agreement, misdemeanors may be tried by less than 12 jurors, but a mere failure to object to trial by less than 12 does not constitute such agreement within this section. *Warwick v. State*, 47 Ark. 568, 2 S.W. 335 (1886).

It is not error for a charge of manslaughter to be tried by a jury of eleven men where defendant not only agreed in open court to a jury of eleven, but also made no objections, saved no exceptions and did not assign this as error in his motion for a new trial. *Ford v. State*, 222 Ark. 16, 257 S.W.2d 30 (1953).

There is no federal rule binding the state courts to use a 12-member jury in state criminal prosecutions, and an agreement to proceed with an 11-member jury in accordance with state law and court rules is not a violation of the constitutional right to trial by jury. *Vinston v. Lockhart*, 850 F.2d 420 (8th Cir. 1988).

Composition.

Although selection of a jury from a representative cross-section of the community is an essential component of the Sixth Amendment right to trial by jury, there is no requirement that the jury which is chosen mirror the community and reflect the distinctive racial groups in the population. *Davis v. State*, 325 Ark. 194, 925 S.W.2d 402 (1996).

Right to Twelve Jurors.

Defendant was deprived of her right to be tried by a twelve-member jury for charges of disorderly conduct and refusal to submit to arrest because she was tried by a jury composed of only six members. *Grinning v. City of Pine Bluff*, 322 Ark. 45, 907 S.W.2d 690 (1995).

Where the defendant was not able to show any prejudice, he was not entitled to a new trial even though the jury contained 13 people. *Davies v. State*, 64 Ark. App. 12, 977 S.W.2d 900 (1998).

16-32-203. Selection for misdemeanor trial.

The jury, for the trial of all prosecutions for misdemeanors, shall be selected in the following manner:

(1) Each party shall have three (3) peremptory challenges, which may be made orally; and

(2)(A) The court shall cause the names of twenty-four (24) competent jurors, written upon separate slips of paper, to be placed in a box to be kept for that purpose, from which the names of eighteen (18) jurors shall be drawn and entered on a list in the order in which they were drawn, and numbered.

(B) Each party shall be furnished with a copy of the list, from which each may strike the names of three (3) jurors and return the list so stricken to the judge, who shall strike from the original list the names struck from the copies.

(C) The first twelve (12) names remaining on the original list shall constitute the jury.

History. Crim. Code, § 192; C. & M. Dig., § 3143; Pope's Dig., § 3978; A.S.A. 1947, § 43-1902; Acts 1993, No. 592, § 2; 1995, No. 1296, § 61.

Publisher's Notes. This section, as amended by Acts 1993, No. 592, § 1, was declared unconstitutional in *Byrd v. State*, 317 Ark. 609, 879 S.W.2d 435 (1994). The

court declared that the pre-amendment version remains viable and extant.

Amendments. The 1993 amendment rewrote this section.

The 1995 amendment deleted the former introductory language of (2); inserted "jurors" following "eighteen (18)" in (2)(A); and deleted former (3).

RESEARCH REFERENCES

UALR L.J. Note, Peremptory Challenges After *Purkett v. Elam*, 115 S. Ct. 1769 (1995): How to Judge a Book By Its

Cover Without Violating Equal Protection, 19 UALR L.J. 249.

CASE NOTES

ANALYSIS

Constitutionality.
Right to twelve jurors.

Constitutionality.

The 1993 amendment of this section and § 16-32-202, which provides for a jury of six persons at the trial court's discretion, violates Ark. Const., Art. 2, § 7. *Byrd v. State*, 317 Ark. 609, 879 S.W.2d 435 (1994).

This section and § 16-32-202, as they existed prior to the enactment of Acts

1993, No. 592, remain viable and extant. *Byrd v. State*, 317 Ark. 609, 879 S.W.2d 435 (1994).

Right to Twelve Jurors.

Defendant was deprived of her right to be tried by a twelve-member jury for charges of disorderly conduct and refusal to submit to arrest because she was tried by a jury composed of only six members. *Grinning v. City of Pine Bluff*, 322 Ark. 45, 907 S.W.2d 690 (1995).

CHAPTER 33

EXAMINATION AND CHALLENGE

SUBCHAPTER

1. GENERAL PROVISIONS.
2. CIVIL PROCEEDINGS.
3. CRIMINAL PROCEEDINGS.

RESEARCH REFERENCES

ALR. Statute or court rule prescribing number of challenges according to nature of offense or extent of punishment. 8 ALR 4th 149.

Propriety of asking prospective female jurors questions on voir dire not asked of

prospective male jurors, or vice versa. 39 ALR 4th 450.

Am. Jur. 47 Am. Jur. 2d, Jury, § 195 et seq.

C.J.S. 50 C.J.S., Juries, § 247 et seq.

SUBCHAPTER 1 — GENERAL PROVISIONS

SECTION.

16-33-101. Examination of prospective jurors.

16-33-101. Examination of prospective jurors.

(a) In all cases, both civil and criminal, the court shall examine all prospective jurors under oath upon all matters set forth in the statutes as disqualifications.

(b) Further questions may be asked by the court, or by the attorneys in the case, in the discretion of the court.

History. Init. Meas. 1936, No. 3, § 16, Acts 1937, p. 1384; Pope's Dig., § 3996; A.S.A. 1947, § 39-226.

A.C.R.C. Notes. The Supreme Court of

Arkansas stated in a Per Curiam of Nov. 24, 1986, that this section was deemed superseded by the Arkansas Rules of Civil Procedure as to civil cases only.

RESEARCH REFERENCES

UALR L.J. Sullivan, An Overview of the Law of Jury Selection for Arkansas Criminal Trial Lawyers, 15 UALR L.J. 37.

CASE NOTES

ANALYSIS

Discretion of court.
Examination by litigants.
Presumption.
Questions.
Waiver.

Discretion of Court.

"Discretion of the court," referred to in this section, does not invest trial court with an arbitrary, all powerful authority to transform discretion into prohibition, nor does it require that in the process of ascertaining the desired facts, counsel must utilize the court as a conduit through which communication must be megaphoned to the jury by way of the dais. *Missouri Pac. Transp. Co. v. Johnson*, 197 Ark. 1129, 126 S.W.2d 931 (1939); *Griffin v. State*, 239 Ark. 431, 389 S.W.2d 900 (1965).

Scope of voir dire examination is largely a matter lying within the sound discretion of the trial judge, the latitude of that discretion being rather wide and not subject to reversal in the absence of clear abuse, and this rule has not been materially affected by ARCrP 32.2. *Finch v.*

State, 262 Ark. 313, 556 S.W.2d 434 (1977).

The scope of voir dire examination by counsel is largely within the sound discretion of the trial court, and counsel's limitation of that examination is not reversible on appeal unless it is a clear abuse of discretion. *Fauna v. State*, 265 Ark. 934, 582 S.W.2d 18 (1979).

The trial court did not abuse its discretion by refusing to allow defendant to strike members of the jury panel in chambers. *Felty v. State*, 306 Ark. 634, 816 S.W.2d 872 (1991).

Examination by Litigants.

This section does not change rule giving litigants right to examine jurors separately in order to determine whether jurors are subject to challenge for cause, or to elicit information on which to base the right of peremptory challenge, subject to the right of the court, acting in its sound discretion, to control the extent of such examination. *Missouri Pac. Transp. Co. v. Johnson*, 197 Ark. 1129, 126 S.W.2d 931 (1939); *Griffin v. State*, 239 Ark. 431, 389 S.W.2d 900 (1965).

There was no error in a felony case

whereby prospective jurors were questioned on voir dire and subjected to challenges for cause and peremptory challenges two jurors at a time, as long as the state and the defendant were allowed to examine jurors individually and the state was required to exercise its peremptory challenges first. *Chenowith v. State*, 291 Ark. 372, 724 S.W.2d 488 (1987).

Presumption.

Where the record recited that certain jurors were duly selected, sworn and impaneled as members of the jury, it would be presumed on appeal that they were examined under oath as to whether they were qualified jurors. *Wilfong v. State*, 96 Ark. 627, 132 S.W. 928 (1910).

Questions.

"Further questions," referred to in this section, includes any pertinent inquiry, respectfully addressed, through which qualifications may be determined, or by which counsel, regardless of the juror's qualifications, may secure information upon which to predicate peremptory challenge. *Missouri Pac. Transp. Co. v. Johnson*, 197 Ark. 1129, 126 S.W.2d 931 (1939).

Questions held to be proper. *Missouri Pac. Transp. Co. v. Talley*, 199 Ark. 835,

136 S.W.2d 688, appeal dismissed, 311 U.S. 722, 61 S. Ct. 5, 85 L. Ed. 470 (1940); *Stovall v. State*, 233 Ark. 597, 346 S.W.2d 212 (1961); *Griffin v. State*, 239 Ark. 431, 389 S.W.2d 900 (1965).

Trial court did not err in not permitting defendants to ask again the simple questions that had been answered on a jury questionnaire. *Clark v. State*, 258 Ark. 490, 527 S.W.2d 619 (1975).

Refusal to permit certain questions held not prejudicial. *Haight v. State*, 259 Ark. 478, 533 S.W.2d 510 (1976).

Waiver.

Where counsel for defense was aware of failure to swear prospective jurors prior to voir dire examination but made no objection until after trial began, and judgment recited that defense counsel announced in open court that all members of the jury "were good for defendant", the objection was waived. *Edens v. State*, 235 Ark. 996, 363 S.W.2d 923 (1963).

Where counsel was offered opportunity to question jurors, but declined, plaintiff was not deprived of any rights under this section. *Hogg v. Darden*, 237 Ark. 478, 374 S.W.2d 184 (1964).

Cited: *Jones v. City of Newport*, 29 Ark. App. 42, 780 S.W.2d 338 (1989).

SUBCHAPTER 2 — CIVIL PROCEEDINGS

SECTION.

16-33-201. Challenge to the array.

16-33-202. Challenge for cause.

SECTION.

16-33-203. Peremptory challenges — Panel.

RESEARCH REFERENCES

Ark. L. Rev. Arkansas Civil Juries, 21
Ark. L. Rev. 527.

16-33-201. Challenge to the array.

A challenge to the array shall be decided by the court.

History. Civil Code, § 345; C. & M. Dig., § 6379; Pope's Dig., § 8341; A.S.A. 1947, § 39-227.

16-33-202. Challenge for cause.

(a) A challenge for cause shall be decided by the court, and, in order to determine the challenge, the particular juror challenged may be sworn, or, at the instance of either party, all of the jurors may be sworn to make true and perfect answers to such questions as may be demanded of them, touching their qualifications as jurors.

(b) The court may allow other testimony in regard to the qualifications of any juror.

History. Civil Code, § 346; C. & M. Dig., § 6380; Pope's Dig., § 8342; A.S.A. 1947, § 39-228.

CASE NOTES**ANALYSIS**

Examination by litigants.

Harmless error.

Objection.

Opinion.

Racial bias.

Examination by Litigants.

Litigants in civil cases, as well as criminal cases, have the right to examine the jurors separately in order to determine whether they are subject to challenge for cause, or to elicit information on which to base the right of peremptory challenge, subject to the right of the court to control extent of examination in its sound discretion. *Baldwin v. Hunnicutt*, 192 Ark. 441, 93 S.W.2d 131 (1936).

Harmless Error.

Error in overruling a challenge of a juror for cause is not prejudicial where the court afterwards allowed the defendant an additional peremptory challenge. *Brewer v. State*, 72 Ark. 145, 78 S.W. 773 (1904).

Objection.

Objections to the qualifications of jurors must be made before they are sworn and impaneled; it is too late on a motion for a new trial even if the cause for disqualification could not have been discovered earlier. *Whitehead v. Wells*, 29 Ark. 99 (1874).

Opinion.

A prospective juror is not disqualified if, from reading newspapers, he has formed an opinion as to the guilt or innocence of the accused. *Daughtry v. State*, 80 Ark. 13, 96 S.W. 748 (1906).

In a criminal case, a juror is not disqualified for cause if he holds to a fixed opinion based on hearsay or rumor, which opinion can be removed by evidence or if he states that he can go into a jury box and disregard such opinions and that he holds no bias or prejudice for or against the accused. *Saint Louis, I.M. & S. Ry. v. Stamps*, 84 Ark. 241, 104 S.W. 1114 (1907); *Jackson v. State*, 103 Ark. 21, 145 S.W. 559 (1912).

Jurors held not to have formed disqualifying opinion. *McElvain v. State*, 101 Ark. 443, 142 S.W. 840 (1911).

Juror held to have formed disqualifying opinion. *Collins v. State*, 102 Ark. 180, 143 S.W. 1075 (1912).

A juror will not be rendered incompetent because of an opinion based upon rumor where he states that he can discard such opinion and try the defendant upon the evidence. *Bealmear v. State*, 104 Ark. 616, 150 S.W. 129 (1912).

Jurors are not incompetent by reason of having formed an opinion as to the defendant's guilt or innocence, where that opinion was based on rumor and where the jurors stated that they would disregard such opinions and base their verdict on testimony. *Ham v. State*, 179 Ark. 20, 13 S.W.2d 805 (1929).

Racial Bias.

Where the questioning allowed regarding racial bias was insufficient to focus the attention of the prospective jurors to any racial prejudice they might entertain, the trial court abused its discretion in restricting voir dire with reference to possible racial bias. *Smith v. State*, 33 Ark. App. 52, 800 S.W.2d 440 (1990).

16-33-203. Peremptory challenges — Panel.

(a) Each party shall have three (3) peremptory challenges, which may be made orally.

(b)(1) However, if either party desires a panel, the court shall cause the names of twenty-four (24) competent jurors, written upon separate slips of paper, to be placed in a box to be kept for that purpose, from which the names of eighteen (18) shall be drawn and entered on a list in the order in which they were drawn, and numbered.

(2) Each party shall be furnished with a copy of the list, from which each may strike the names of three (3) jurors and return the list so struck to the judge, who shall strike from the original list the names so stricken from the copies, and the first twelve (12) names remaining on the original list shall constitute the jury.

History. Civil Code, § 347; C. & M. Dig., §§ 6381, 6383, 6384; Pope's Dig., §§ 8343, 8345, 8346; A.S.A. 1947, § 39-229.

Cross References. Peremptory challenge of alternate juror, § 16-30-102.

RESEARCH REFERENCES

UALR L.J. Note, Peremptory Challenges After *Purkett v. Elam*, 115 S. Ct. 1769 (1995): How to Judge a Book By Its

Cover Without Violating Equal Protection, 19 UALR L.J. 249.

CASE NOTES**ANALYSIS**

Construction.
Discrimination.
Drawing from list.
Examination by litigants.
Exhaustion of challenges.
Method of selection.
Multiple parties.
Time of challenge.

Construction.

Under this section, parties are entitled to have 18 jurors on the list before they are required to exercise the right of peremptory challenge; this requirement is mandatory, and a failure to comply with it is reversible error. *Gulf, C. & S.F. Ry. v. James*, 48 F. 148 (8th Cir. 1891); *Gulf, C. & S.F. Ry. v. Washington*, 49 F. 347 (8th Cir. 1891).

This section is mandatory. *Young v. Morrison*, 159 Ark. 270, 251 S.W. 869 (1923).

Discrimination.

Where there were several black persons on the panel, the state had strikes remain-

ing, and there was no indication of discrimination in the record, the defendant did not show such facts and circumstances to raise the inference that the prosecutor used strikes to exclude the veniremen from the petit jury solely on account of their race. *Clay v. State*, 290 Ark. 54, 716 S.W.2d 751 (1986).

Drawing from List.

It was error for the court, in response to claimant's motion for a drawn and struck jury, without subjecting the panel of jurors to challenges for cause and without drawing eighteen names from a list of twenty-four, to call a list of eighteen jurors and direct the parties to challenge peremptorily from that list. *Arkansas State Hwy. Comm'n v. Stanley*, 237 Ark. 664, 375 S.W.2d 229 (1964).

Examination by Litigants.

Litigants in civil and criminal cases have right to examine the jurors separately in order to determine if they are subject to challenge for cause or to elicit information on which to base a peremp-

tory challenge. *Baldwin v. Hunnicutt*, 192 Ark. 441, 93 S.W.2d 131 (1936).

Exhaustion of Challenges.

Where appellant had exhausted all of its peremptory challenges under this section, one of which was used to strike the juror in question, it was in a position to complain of any error of the trial court in refusing to strike a juror for cause. *Arkansas State Hwy. Comm'n v. Young*, 241 Ark. 765, 410 S.W.2d 120 (1967).

Right to peremptory challenges is conferred as a means to reject jurors, not to select jurors, and until such time as a party is forced to take an objectionable juror without the privilege of exercising a peremptory challenge, he has shown no prejudice. *Arkansas State Hwy. Comm'n v. Dalrymple*, 252 Ark. 771, 480 S.W.2d 955 (1972).

Method of Selection.

Method of selecting jurors and exercising challenges held to be proper. *Young v. Morrison*, 159 Ark. 270, 251 S.W. 869 (1923); *Myers v. Martin*, 168 Ark. 1028, 272 S.W. 856 (1925).

Substitution of different juror for one of the first 12 jurors on the list was harmless error. *Falcon Zinc Co. v. Flippin*, 171 Ark. 1151, 287 S.W. 394 (1926).

Trial court did not abuse its discretion in allowing a drawn jury upon motion of plaintiffs after three names of prospective jurors had been stricken from the list by defendants and the list returned to the clerk, since defendants' challenges were not revealed to anybody. *Caldarera v. Giles*, 235 Ark. 418, 360 S.W.2d 767 (1962).

Multiple Parties.

In a suit for damages, where several tortfeasors are joined together as co-defendants, they are allowed but three peremptory challenges. *Waters-Pierce Oil Co. v. Burrows*, 77 Ark. 74, 96 S.W. 336 (1905); *Fidelity-Phenix Fire Ins. Co. v.*

Friedman, 117 Ark. 71, 174 S.W. 215 (1915).

Where causes of action against several defendants were improperly joined, all of the defendants were entitled jointly to the statutory number of challenges. *Ft. Smith Light & Traction Co. v. Bailey*, 153 Ark. 574, 241 S.W. 42 (1922).

Third-party defendants whose interests are in conflict with the regular defendants in the suit are not entitled to three peremptory challenges in the selection of the jury in addition to the three already allowed the regular defendant. *Hogan v. Hill*, 229 Ark. 758, 318 S.W.2d 580 (1958).

For the purpose of exercising peremptory challenges the court had some jurisdiction to group the parties. *Utley v. Heckinger*, 235 Ark. 780, 362 S.W.2d 13 (1962).

The owner of the fee and her lessee were entitled to a total of three peremptory challenges in a condemnation suit brought against them by the Arkansas State Highway Commission. *Arkansas State Hwy. Comm'n v. Sisson*, 238 Ark. 720, 384 S.W.2d 264 (1964).

In an action in which the defendants interpleaded additional parties on a third-party complaint, it was not error to require the plaintiffs to share their three peremptory challenges with the primary defendants. *Smith v. Goble*, 248 Ark. 415, 452 S.W.2d 336 (1970).

Time of Challenge.

It is within the court's discretion to permit the state to challenge jurors peremptorily after they have been examined and accepted as jurors in the case. *Carr v. State*, 81 Ark. 589, 99 S.W. 831 (1907).

Where the defendant has not exhausted all of his peremptory challenges, the court, in the exercise of its discretion, may permit the state to peremptorily challenge a juror after he has been accepted on the jury. *Dewein v. State*, 114 Ark. 472, 170 S.W. 582 (1914).

SUBCHAPTER 3 — CRIMINAL PROCEEDINGS

SECTION.

16-33-301. Challenge to grand juror.

16-33-302. Challenge to trial jurors generally.

16-33-303. Challenge to trial jurors — Individual juror generally.

SECTION.

16-33-304. Challenge to trial jurors — Individual juror for cause.

16-33-305. Challenge to trial jurors — Individual juror — Peremptory.

SECTION.

- 16-33-306. Challenge to trial jurors —
Order.
16-33-307. Challenge to trial jurors —
Several defendants.

SECTION.

- 16-33-308. Challenge to trial jurors —
Hearing.

RESEARCH REFERENCES

ALR. Additional peremptory challenges because of multiple criminal charges. 5 ALR 4th 533.

Necessity for presence of judge during voir dire examination of prospective jurors in state criminal case. 39 ALR 4th 465.

Ark. L. Rev. Criminal Procedure: A Survey of Arkansas Law and the American Bar Association's Standards, 26 Ark. L. Rev. 169.

UALR L.J. Note, Criminal Procedure — Voir Dire — Prosecutors Must Now

Show That a Juror is Irrevocably Committed to Voting Against the Maximum Penalty Before Striking For Cause, Haynes v. State, 270 Ark. 685, 606 S.W.2d 563 (1980), 4 UALR L.J. 371.

Note, Peremptory Challenges in Felony Prosecutions, 10 UALR L.J. 415.

Note, Peremptory Challenges After Purkett v. Elam, 115 S. Ct. 1769 (1995): How to Judge a Book By Its Cover Without Violating Equal Protection, 19 UALR L.J. 249.

CASE NOTES

Discretion of Court.

The trial court did not abuse its discretion by refusing to allow defendant to

strike members of the jury panel in chambers. Felty v. State, 306 Ark. 634, 816 S.W.2d 872 (1991).

16-33-301. Challenge to grand juror.

(a) Every person held to answer a criminal charge may object to the competency of anyone summoned to serve as a grand juror, before he is sworn, on the ground that he is the prosecutor or complainant upon any charge against the person or that he is a witness on the part of the prosecution and has been summoned or bound in a recognizance as such.

(b) If the objection is established, the person so challenged shall be set aside and another juror summoned.

History. Rev. Stat. ch. 45, § 60; C. & M. Dig., § 3005; Pope's Dig., § 3827; A.S.A. 1947, § 43-902.

CASE NOTES

ANALYSIS

- Applicability.
- Grounds.
- Opportunity to challenge.
- Timeliness of objection.

Applicability.

This section applies only to those persons held to answer criminal charges which are to be investigated and acted upon by the grand jury, the formation of which they are entitled to challenge, and

not to persons who are already indicted but against whom a second indictment is found for the same offense. *Hudspeth v. State*, 50 Ark. 534, 9 S.W. 1 (1888); *Baker v. State*, 58 Ark. 513, 25 S.W. 603 (1894).

Grounds.

In a prosecution for arson in burning a hotel, the son-in-law of the hotel owner was not incompetent as a grand juror. *Dame v. State*, 191 Ark. 1107, 89 S.W.2d 610 (1936).

Challenge to grand juror on ground he had unsuccessfully opposed defendant as a candidate for office was properly overruled. *Rice v. State*, 204 Ark. 236, 161 S.W.2d 401 (1942).

The practice of allowing jurors to socialize with prosecutors and discuss the intricate interaction that occurs amongst jurors during deliberations, when the panel is still being used and the prosecutor can use such information in its selection of jurors in future cases, is troubling; the state certainly cannot rely upon such secret and undocumented, nebulous hearsay, referred to simply as "information," as a justification for the exercising of peremptory strikes against a cognizable racial group when the record discloses no other significant nonracial distinctions between the jurors stricken and the jurors accepted. *Devose v. Norris*, 867 F. Supp. 836 (E.D. Ark. 1994), *aff'd as modified*, 53 F.3d 201 (8th Cir. 1995).

Opportunity to Challenge.

One accused of a felony cannot, on appeal, raise the objection that, although in

jail, he was not afforded an opportunity to appear and object to the formation of the grand jury if, in his motion to quash the indictment, he did not show that any of the grand jury was disqualified. *Eastling v. State*, 69 Ark. 189, 62 S.W. 584 (1901).

An indictment will not be quashed on the ground that the accused was confined in jail at the time the grand jury was impaneled and was not given an opportunity to challenge the competency of any member thereof when it does not appear that he was prejudiced thereby or denied the benefit of any statutory right. *Threet v. State*, 110 Ark. 152, 161 S.W. 139 (1913).

Timeliness of Objection.

A disqualification of a grand juror is good cause for challenge before an indictment is found or of a plea in abatement before the trial, but it is too late to make such objection after verdict. *Fenalty v. State*, 12 Ark. 630 (1852).

An objection that the name of a member of the grand jury was indorsed on an indictment for burglary as a state witness and that he was cashier of the bank which was burglarized cannot be raised for the first time on appeal by one who, being held to answer a criminal charge, was in the court room when the grand jury was impaneled and was afforded an opportunity to challenge any member of the panel. *Edwards v. State*, 171 Ark. 778, 286 S.W. 935 (1926).

16-33-302. Challenge to trial jurors generally.

A challenge is an objection to the trial jurors and is of two (2) kinds:

- (1) To the panel;
- (2) To the individual juror.

History. *Crim. Code*, § 199; *C. & M. Dig.*, § 3151; *Pope's Dig.*, § 3986; *A.S.A.* 1947, § 43-1910.

RESEARCH REFERENCES

UALR L.J. Sullivan, An Overview of the Law of Jury Selection for Arkansas Criminal Trial Lawyers, 15 *UALR L.J.* 37.

CASE NOTES

Cited: *Horne v. State*, 253 Ark. 1096, 490 S.W.2d 806 (1973).

16-33-303. Challenge to trial jurors — Individual juror generally.

(a) The challenge to the individual juror is:

- (1) For cause;
- (2) Peremptory.

(b) The challenge must be taken before he is sworn in chief, but the court, for a good cause, may permit it to be made at any time before the jury is completed.

(c) The challenge to the juror shall first be made by the state and then by the defendant, and the state must exhaust its challenges to each particular juror before the juror is passed to the defendant for challenge or acceptance.

History. Crim. Code, §§ 203, 204, 216; Dig., §§ 3988, 3989, 4000; A.S.A. 1947, C. & M. Dig., §§ 3153, 3154, 3164; Pope's §§ 43-1913, 43-1914, 43-1924.

CASE NOTES

ANALYSIS

Challenges.

Discharge of sworn juror.

For cause.

Prosecutorial misconduct.

Standard of review.

—Racial discrimination.

Time of challenge.

Waiver of objection.

Challenges.

There was no error in a felony case whereby prospective jurors were questioned on voir dire and subjected to challenges for cause and peremptory challenges two jurors at a time, as long as the state and the defendant were allowed to examine jurors individually and the state was required to exercise its peremptory challenges first. *Chenowith v. State*, 291 Ark. 372, 724 S.W.2d 488 (1987).

Discharge of Sworn Juror.

Court properly discharged a juror related to defendant within the prohibited degree after swearing in. *McDaniel v. State*, 228 Ark. 1122, 313 S.W.2d 77 (1958).

For Cause.

When a defendant has used all his peremptory challenges before a prospective

juror is called, he may only challenge that juror for cause and not peremptorily, and it is reversible error to thereafter hold a biased juror competent. *Beed v. State*, 271 Ark. 526, 609 S.W.2d 898 (1980).

Where, during voir dire, a prospective juror indicated that there was a possibility that she could not consider sending anyone to the penitentiary for a crime of the type involved, the trial court did not err in excusing the juror for cause. *Fisk v. State*, 5 Ark. App. 5, 631 S.W.2d 626 (1982).

Because the trial court (a) failed to make a finding, from all relevant circumstances, as to the sufficiency of the state's gender-neutral explanation, and then (b) failed to conduct a sensitive inquiry into the basis for each of the challenges by the state, the evidence did not establish that the state's challenges were for valid reasons without any gender bias; therefore, the defendant's constitutional rights had not been protected and the trial court's error required a reversal and retrial. *Cleveland v. State*, 318 Ark. 738, 888 S.W.2d 629 (1994).

Prosecutorial Misconduct.

Both in this case and in *Miller v. Lockhart*, 861 F. Supp. 1425 (E.D. Ark.

1994), the prosecutor consistently and systematically excluded African-Americans from participating as jurors through the use of peremptory challenges. *Ford v. Lockhart*, 861 F. Supp. 1447 (E.D. Ark. 1994), petition dismissed, *In re Norris*, 38 F.3d 1046 (8th Cir. 1994), *aff'd sub nom. Ford v. Norris*, 67 F.3d 162 (8th Cir. 1995).

Standard of Review.

—Racial Discrimination.

A constitutional violation involving the selection of jurors in a racially discriminatory manner is a "structural defect" in the trial mechanism which cannot be subjected to a harmless error analysis. *Ford v. Norris*, 67 F.3d 162 (8th Cir. 1995).

Time of Challenge.

The refusal of the court to permit the defendant to challenge a juror peremptorily after accepting him is not error if no abuse of discretion is shown. *Allen v. State*, 70 Ark. 337, 68 S.W. 28 (1902).

In the absence of a showing to the contrary, it is presumed that the challenge was made before the juror was sworn in chief. *Daniels v. State*, 76 Ark. 84, 88 S.W. 844 (1905).

Court may permit peremptory challenge by state after juror is accepted. *Carr v. State*, 81 Ark. 589, 99 S.W. 831 (1907).

The right of the state to challenge peremptorily after a juror has been accepted must be exercised before the defendant has exhausted his challenges. *Dewein v. State*, 114 Ark. 472, 170 S.W. 582 (1914). But see *Nail v. State*, 231 Ark. 70, 328 S.W.2d 836 (1959).

It was not prejudicial error to permit the prosecuting attorney to exercise a peremptory challenge on a juror whom he had accepted where the defendants had a peremptory challenge left. *Ruloff v. State*, 142 Ark. 477, 219 S.W. 781 (1920). But see *Nail v. State*, 231 Ark. 70, 328 S.W.2d 836 (1959).

It is not error to permit the state to interpose peremptory challenges to jurors who have been accepted by both parties even though defendant's challenges have been exhausted, unless it first be shown that the defendant will be prejudiced by the service of the venireman accepted in lieu of the juror excused. *Nail v. State*, 231 Ark. 70, 328 S.W.2d 836 (1959).

Where there were grounds for disqualification of juror but the state reluctantly accepted the juror at first in a good faith attempt to get a jury, and the state's tardy request to strike came after it was apparent that additional prospective jurors had been called, the trial court did not abuse its discretion in permitting the tardy strike. *Johnson v. State*, 261 Ark. 13, 545 S.W.2d 639 (1977).

Waiver of Objection.

Defendant could not object to the alleged bias of juror in original trial in a federal habeas corpus proceeding where counsel had not objected in state court as required by this section. *Graham v. Mabry*, 645 F.2d 603 (8th Cir. 1981).

Cited: *Jeffries v. State*, 255 Ark. 501, 501 S.W.2d 600 (1973).

16-33-304. Challenge to trial jurors — Individual juror for cause.

(a) The challenge for cause may be taken either by the state or by the defendant.

(b) It may be general, that the juror is disqualified in serving in any case, or particular, that he is disqualified from serving in the case on trial.

(1) Causes of general challenge are:

(A) A want of the qualifications prescribed by law;

(B) A conviction for a felony;

(C) Unsoundness of mind, or such defect in the faculties of the mind, or organs of the body, as renders him incapable of properly performing the duties of a juror.

(2) Particular causes of challenge are actual and implied bias.

(A) Actual bias is the existence of such a state of mind on the part of the juror, in regard to the case or to either party, as satisfies the court, in the exercise of a sound discretion, that he cannot try the case impartially and without prejudice to the substantial rights of the party challenging.

(B) A challenge for implied bias may be taken in the case of the juror:

(i) Being related by consanguinity, or affinity, or who stands in the relation of guardian and ward, attorney and client, master and servant, landlord and tenant, employer and employed on wages, or who is a member of the family of the defendant or of the person alleged to be injured by the offense charged, or on whose complaint the prosecution was instituted;

(ii) Being adverse to the defendant in a civil suit, or having complained against or being accused by him in a criminal prosecution;

(iii) Having served on the grand jury that found the indictment or on the coroner's jury that inquired into the death of the party, whose death is the subject of the indictment;

(iv) Having served on a trial jury which has tried another person for the offense charged in the indictment;

(v) Having been one of the former jury sworn to try the same indictment and whose verdict was set aside, or who were discharged without a verdict;

(vi) Having served as a juror in a civil action brought against the defendant for the act charged in the indictment;

(vii) When the offense is punishable with death, the entertaining of such conscientious opinions as would preclude him from finding the defendant guilty.

(c) An exemption from serving on a jury is not a cause of challenge. Having formed or expressed an opinion merely from rumor shall not be a cause of challenge.

History. Crim. Code §§ 207-212, 218; Dig., §§ 3990-3995, 3999; A.S.A. 1947, C. & M. Dig., §§ 3156-3160, 3163; Pope's §§ 43-1915 — 43-1920, 43-1923.

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Constitutionality.

Death-qualification of the jury in capital cases has been and continues to be a constitutional procedure. Jurors who are unalterably opposed to capital punishment should not be permitted to participate in the determination of guilt or innocence in capital cases and their exclusion is proper, for either of two reasons; first, because conviction proneness is neither inherently wrong nor destructive of the juror's impartiality, and second, because a jury system that has served its purpose admirably throughout the nation's history ought not to be twisted out of shape for the benefit of those persons least entitled to special favors. It has always been the law in Arkansas, except when the punishment is mandatory, that the same jurors who have the responsibility for determining guilt or innocence must also shoulder the burden of fixing the punishment; that is as it should be, for the two questions are necessarily interwoven. *Rector v. State*, 280 Ark. 385, 659 S.W.2d 168 (1983), cert. denied, 466 U.S. 988, 104 S. Ct. 2370, 80 L. Ed. 2d 842 (1984).

Construction.

This section is construed liberally toward insuring the constitutional right of a defendant to a trial by an impartial jury secured by Ark. Const., Art. 2, § 10. *Beed v. State*, 271 Ark. 526, 609 S.W.2d 898 (1980).

Implied bias arises by implication of law and is liberally construed in criminal cases. *Linell v. State*, 283 Ark. 162, 671 S.W.2d 741 (1984), cert. denied, 470 U.S. 1062, 105 S. Ct. 1778, 84 L. Ed. 2d 837 (1985).

Actual Bias.

It is within discretion of trial court to determine whether a juror has actual bias, and a judgment will not be reversed unless the court abuses that discretion. *Henslee v. State*, 251 Ark. 125, 471 S.W.2d 352 (1971).

When actual bias is in question, the qualification of a juror is within the sound discretion of the trial judge because he is in a better position to weigh the demeanor of the prospective juror's response to the questions on voir dire; jurors are assumed to be unbiased and the burden of demonstrating actual bias is on the appellant. *Linell v. State*, 283 Ark. 162, 671 S.W.2d

741 (1984), cert. denied, 470 U.S. 1062, 105 S. Ct. 1778, 84 L. Ed. 2d 837 (1985).

A prospective juror does not have to admit his bias before the trial court may excuse him. *Fleming v. State*, 284 Ark. 307, 681 S.W.2d 390 (1984).

Jurors are presumed unbiased and the burden of proving actual bias is on the party challenging the juror. *Fleming v. State*, 284 Ark. 307, 681 S.W.2d 390 (1984); *Blann v. State*, 15 Ark. App. 364, 695 S.W.2d 382 (1985).

It was an abuse of discretion for the trial court to qualify a juror who indicated a number of times during the questioning that she was biased, where the defendant used all his peremptory challenges and demonstrated that he would have excused another juror if he'd had another peremptory challenge, thereby properly preserving his record. *Bovee v. State*, 19 Ark. App. 268, 720 S.W.2d 322 (1986).

—Failure to Disclose.

If a prejudiced juror does sit in the case, it is not grounds for a new trial unless it appears that he imposed himself upon the panel by concealment or prevarication. *Colbert v. State*, 156 Ark. 98, 245 S.W. 801 (1922).

Where a juror heard the testimony of the prosecuting witness at the examining trial and pronounced it the truth, but failed to disclose that fact on voir dire, he was disqualified as a juror notwithstanding that he testified that he entered the jury box without prejudice nor did it matter that the evidence established the defendant's guilt. *Lane v. State*, 168 Ark. 528, 270 S.W. 974 (1925).

—Preconceived Opinion.

When a juror admits that he has formed or expressed an opinion as to the guilt or innocence of the prisoner, the law regards him as an unfit person to compose part of such impartial jury as the bill of rights secures to the accused, but the disqualification is removed if he is able to state that such opinion is founded upon rumor in its proper sense and is not such as to bias or prejudice his mind. *Meyer v. State*, 19 Ark. 156 (1857).

When a juror states upon his voir dire that he has formed and expressed an opinion of the prisoner's guilt, but has no prejudice against him, and is accepted by the prisoner without examination as to his

feelings and statements, the prisoner cannot afterward urge after-discovered statements of the juror showing strong bias and belief of his guilt, as a ground for a new trial. *Werner v. State*, 44 Ark. 122 (1884).

Persons offered as jurors who state upon their voir dire that they have formed an opinion as to the guilt or innocence of the accused which it would take evidence to remove, are incompetent and should be rejected, notwithstanding that they further state that they can give the accused a fair and impartial trial. *Polk v. State*, 45 Ark. 165 (1885), overruling *Casey v. State*, 37 Ark. 67 (1881). See *Caldwell v. State*, 69 Ark. 322, 63 S.W. 59 (1901).

Evidence sufficient to find juror competent. *Sneed v. State*, 47 Ark. 180, 1 S.W. 68 (1886); *Gibson v. State*, 135 Ark. 520, 205 S.W. 898 (1918); *Hill v. State*, 275 Ark. 71, 628 S.W.2d 284, cert. denied, 459 U.S. 882, 103 S. Ct. 180, 74 L. Ed. 2d 147 (1982).

A preconceived opinion about the merits of the case renders a juror prima facie incompetent. *Taylor v. State*, 72 Ark. 613, 82 S.W. 495 (1904); *Bealmear v. State*, 104 Ark. 616, 150 S.W. 129 (1912); *Davidson v. State*, 109 Ark. 450, 160 S.W. 385 (1913); *McGough v. State*, 113 Ark. 301, 167 S.W. 857 (1914); *Dewein v. State*, 114 Ark. 472, 170 S.W. 582 (1914).

Opinion based upon hearsay or mere rumor or formed from reading newspapers does not disqualify, if the juror can try the case on the evidence only. *Sullins v. State*, 79 Ark. 127, 95 S.W. 159 (1906); *Daughtry v. State*, 80 Ark. 13, 96 S.W. 748 (1906); *Decker v. State*, 85 Ark. 64, 107 S.W. 182 (1908); *McElvain v. State*, 101 Ark. 443, 142 S.W. 840 (1911).

An opinion formed from talking with witnesses and stating that defendant should be lynched disqualifies. *Collins v. State*, 102 Ark. 180, 143 S.W. 1075 (1912).

Evidence sufficient to find juror incompetent. *Snyder v. State*, 151 Ark. 601, 237 S.W. 87 (1922).

Discharge of Sworn Juror.

After the jury was sworn, the court, on discovering that one of the jurors was on the bond of the defendant, discharged the juror; the defendant was not entitled to a release on the ground that he had been in jeopardy. *Harris v. State*, 177 Ark. 186, 6 S.W.2d 34 (1928).

Where, following selection and swearing in of jury, it was brought to the court's attention that one of the jurors was related to the defendant in the case and the court thereupon discharged the juror, the conclusion drawn by appellant that he had been placed in jeopardy was not tenable nor did the trial court commit reversible error in discharging a juror related to defendant within the prohibited degree. *McDaniel v. State*, 228 Ark. 1122, 313 S.W.2d 77 (1958).

Where there was no sound reason for discharging the jury and there was certainly no overruling necessity, the effect of declaring a mistrial, in view of the fact that defendant was perfectly willing to have relative of officer retained as juror, was to put the accused in jeopardy and his motion to be discharged because of a former jeopardy should have been granted. *Jones v. State*, 230 Ark. 18, 320 S.W.2d 645 (1959).

Discrimination.

Prima facie case of purposeful discrimination may be made by showing that the totality of the relevant facts gives rise to an inference of discriminatory purpose, demonstrating total or seriously disproportionate exclusion of Negroes from jury venires, or showing a pattern of strikes, or questions and statements, by a prosecuting attorney during voir dire. *Ward v. State*, 293 Ark. 88, 733 S.W.2d 728 (1987). (But see, *Colbert v. State*, 304 Ark. 250, 801 S.W.2d 643 (1990)). See also *MacKintrush v. State*, 334 Ark. 390, 978 S.W.2d 293 (1998).

The standard of review for reversal of a trial court's evaluation of the sufficiency of the state's racially neutral explanation of alleged discrimination must test whether the court's findings are clearly against a preponderance of the evidence. In every instance, however, the court shall state, in response to the defendant's objections, its ruling as to the sufficiency or insufficiency of the racially neutral explanation provided by the state. *Colbert v. State*, 304 Ark. 250, 801 S.W.2d 643 (1990).

Upon a showing by a defendant of circumstances which raise an inference that the prosecutor exercised one or more of his peremptory challenges to exclude venire persons from the jury on account of race, the burden then shifts to the state to establish that the peremptory strike(s)

were for racially neutral reasons. The trial court shall then determine from all relevant circumstances the sufficiency of the racially neutral explanation. Only if the state's explanation appears insufficient, must the trial court then conduct a sensitive inquiry into the basis for each of the challenges by the state. *Colbert v. State*, 304 Ark. 250, 801 S.W.2d 643 (1990).

Exhaustion of Peremptory Challenges.

When defendant's peremptory challenges are exhausted, it is error to hold a biased juror competent. *Snyder v. State*, 151 Ark. 601, 237 S.W. 87 (1922).

When a defendant has used all his peremptory challenges before a prospective juror is called, he may only challenge that juror for cause and not peremptorily, and it is reversible error to thereafter hold a biased juror competent. *Beed v. State*, 271 Ark. 526, 609 S.W.2d 898 (1980).

A defendant may challenge any error of the trial court in refusing to strike a juror for cause if the record shows that, as a result of refusal to strike, defendant was forced to exercise peremptory challenge and a subsequent juror he objected to was forced upon him because he had exhausted his peremptory challenges. For that rule to be applicable, however, the defendant must not only show that the trial judge abused his discretion in not excusing the first juror for cause, but must also demonstrate from the record that he would have excused the subsequent juror had he been able to peremptorily challenge him. *Miller v. State*, 8 Ark. App. 165, 649 S.W.2d 407 (1983).

Former Police Officer.

The trial court in a criminal prosecution did not commit prejudicial error by failing to excuse for cause a venireman, where the defendant peremptorily excused this venireman and the record reflected that no objectionable juror was forced upon the defendant without his having the privilege of exercising a peremptory challenge. *Stephens v. State*, 277 Ark. 113, 640 S.W.2d 94 (1982).

Illness.

It was not error to excuse a juror, after he had been accepted by both sides, where the juror stated that he was subject to spells and liable to be sick if confined with

the jury. *Caughron v. State*, 99 Ark. 462, 139 S.W. 315 (1911).

Implied Bias.

The mere fact that a proposed juror ran a boat for the parties that searched for the body of the deceased does not disqualify him. *Coats v. State*, 101 Ark. 51, 141 S.W. 197 (1911).

Circumstances held not to warrant disqualification of juror. *Gammel v. State*, 259 Ark. 96, 531 S.W.2d 474 (1976); *Jones v. State*, 264 Ark. 935, 576 S.W.2d 198 (1979); *Swindler v. State*, 267 Ark. 418, 592 S.W.2d 91 (1979), cert. denied, 449 U.S. 1057, 101 S. Ct. 630, 66 L. Ed. 2d 511 (1980); *Moss v. Lockhart*, 971 F.2d 77 (8th Cir. 1992).

Circumstances held to warrant disqualification of juror. *Grigsby v. State*, 260 Ark. 499, 542 S.W.2d 275 (1976); *Walton v. State*, 279 Ark. 193, 650 S.W.2d 231 (1983); *Fleming v. State*, 284 Ark. 307, 681 S.W.2d 390 (1984).

The question of a juror's qualification lies within the sound judicial discretion of the trial judge and defendant has the burden of showing the prospective juror's disqualification on grounds of implied bias. *Beed v. State*, 271 Ark. 526, 609 S.W.2d 898 (1980).

Where one juror said that her husband and son had been represented by the prosecuting attorney in a property matter, and another said the prosecutor had represented her adult daughter two years earlier, the trial judge did not abuse his discretion in denying the challenges for cause, for the jurors did not appear to be biased. *Bliss v. State*, 288 Ark. 546, 708 S.W.2d 74 (1986).

—Capital Punishment.

It was not error, in a capital case, to permit the prosecuting attorney to challenge a juror peremptorily, after he had been accepted but before the jury was complete, where the juror informed the court that he had conscientious scruples against capital punishment. *Brewer v. State*, 72 Ark. 145, 78 S.W. 773 (1904).

Where several veniremen on their voir dire stated that they would not return a verdict on circumstantial evidence and assess the death penalty, but would return a verdict on such evidence and assess life imprisonment, and the prosecuting attorney announced that he would waive the

infliction of the death penalty, the selection of those veniremen as jurors was not prejudicial to the defendant. *Rogers v. State*, 136 Ark. 161, 206 S.W. 152 (1918).

It was proper for prosecutor to ask prospective juror if he had any scruples against death penalty, even though statute provided for either death penalty or life imprisonment. *Needham v. State*, 215 Ark. 935, 224 S.W.2d 785 (1949).

Trial court did not err in refusing to allow defense attorney in prosecution for rape to ask a prospective juror if he would feel obligated to impose death penalty rather than life imprisonment upon finding of guilty, as there is no statutory recognition of implied bias in favor of capital punishment; hence, court had the right to exercise its discretion. *Needham v. State*, 215 Ark. 935, 224 S.W.2d 785 (1949).

Where qualification of jury on the death penalty was done in accordance with this section, there was no error. *Baxter v. State*, 225 Ark. 239, 281 S.W.2d 931 (1955).

Since this section, which recognizes implied bias when a juror entertains such conscientious opinions as would preclude him from finding the defendant guilty of an offense punishable by death, necessarily shifts the implied bias from the mere finding of guilt to the imposition of the death penalty because the legislature gave the jury the option of imposing life imprisonment in all capital cases, it was not error not to examine the veniremen to determine whether they could even find the defendant guilty. *Miller v. State*, 273 Ark. 508, 621 S.W.2d 482 (1981).

The removal for cause, prior to the guilt phase of a bifurcated capital trial, of prospective jurors who state that they cannot under any circumstances vote for the imposition of the death penalty does not violate a defendant's right under the Sixth and Fourteenth Amendments of the United States Constitution to have his guilt or innocence determined by an impartial jury selected from a representative cross section of the community. *Lockhart v. McCree*, 476 U.S. 162, 106 S. Ct. 1758, 90 L. Ed. 2d 137 (1986).

Since Arkansas recognizes the death penalty, jurors in a capital murder case must be able to consider imposing a death sentence if they are to perform their function as jurors; the trial court correctly

decided that those excused jurors could not perform their duties because they could not consider imposing a death sentence. *Williams v. State*, 288 Ark. 444, 705 S.W.2d 888 (1986).

A state may not carry out a sentence of death imposed by a jury which was selected by excluding veniremen for cause simply because they voiced general objections to the death penalty or expressed religious or conscientious scruples against its infliction; the most that can be demanded of a prospective juror is that he or she be willing to consider all of the penalties provided by state law, and that he or she not be irrevocably committed before the trial has begun to vote against the death penalty regardless of the facts and circumstances that might emerge. *Orndorff v. Lockhart*, 707 F. Supp. 1062 (E.D. Ark. 1988), modified, 906 F.2d 1230 (8th Cir. 1990), cert. denied, 499 U.S. 931, 111 S. Ct. 1338, 113 L. Ed. 2d 269 (1991).

—Employer and Employee.

Employees of victimized corporation were biased by implication and should not have been allowed to sit on jury where defendant was charged with arson of property which belonged to the corporation and defendant had exhausted all of his peremptory challenges. *Byrd v. State*, 251 Ark. 149, 471 S.W.2d 350 (1971).

—Landlord and Tenant.

Where a juror testified that she was not the landlord of either of the defendants and that she did not rent from either of them, there was no merit to the contention that the juror was disqualified as being landlord of one of the appellees. *Crouch v. Richards*, 212 Ark. 980, 208 S.W.2d 460 (1948).

—Maximum Penalty.

Where, on voir dire, after stating the minimum and maximum penalties for the crimes charged, the prosecutor asked the prospective jurors whether they would consider the maximum penalty, the trial court properly allowed the inquiry, because the jurors were really only asked whether they would consider all the penalties provided by law. *Stephens v. State*, 277 Ark. 113, 640 S.W.2d 94 (1982).

Where a prospective juror was irrevocably committed to voting against the possible maximum penalties, regardless of the facts and circumstances that might have

ensued in the course of the trial, the trial court did not err in excusing the venireman for cause. *Stephens v. State*, 277 Ark. 113, 640 S.W.2d 94 (1982).

—Prior Service.

It was prejudicial error for the trial court to require the defendant to peremptorily challenge a venireman who served on the grand jury which indicted the defendant where, before the jury was completed, the defendant exhausted all his peremptory challenges. *Holman v. State*, 115 Ark. 305, 171 S.W. 107 (1914).

Where some jurors in defendant's prosecution had previously sat on juries which convicted different defendants for the same offense based on the testimony of the same prosecuting witness who testified against defendant, this section did not apply, and thus the trial court did not abuse its discretion in refusing to disqualify the jurors for cause on the grounds that the jurors had prejudged the credibility of the prosecuting witness. *Holland v. State*, 260 Ark. 617, 542 S.W.2d 761 (1976); *Pickens v. State*, 260 Ark. 633, 542 S.W.2d 764 (1976).

The plain language of subdivision (b)(2)(B)(iv) of this section permits persons accused of a crime the right to exclude all jurors who have served as jurors in the trial of a co-defendant; the right need not be extended to exclude potential jurors who had not actually served as a juror in a prior trial involving the same offense. *McClendon v. State*, 316 Ark. 688, 875 S.W.2d 55 (1994); *Goins v. State*, 319 Ark. 689, 890 S.W.2d 602 (1995).

—Relationship.

Juror was not disqualified by fact that his son had married a member of a family into which member of prosecuting witness' family had also married, since there was no relation of affinity between juror and prosecuting witness or any member of her family, and denial of new trial on ground of juror's failure to disclose the above relation was not abuse of discretion. *Thornsberry v. State*, 192 Ark. 435, 92 S.W.2d 203 (1936).

In prosecution for destroying school building by means of dynamite, juror, who was brother-in-law of fire chief whose city-owned car was dynamited on the same night as the school building, was not disqualified under this section because fire

chief suffered no property damage and was not a witness during the trial. *Lauderdale v. State*, 233 Ark. 96, 343 S.W.2d 422 (1961).

A juror was properly excused by the court after being accepted by both prosecution and defense when it was learned that he was a cousin to a secretary of the prosecuting attorney, since the judge has the discretion to excuse a juror even where the issue of bias may be more implied than actual and even though the situation does not clearly fall within this section or § 16-31-102, since it would be impossible for the statutes to cover every conceivable circumstance touching on a juror's possible bias. *Ruiz v. State*, 273 Ark. 94, 617 S.W.2d 6, cert. denied, 454 U.S. 1093, 102 S. Ct. 659, 70 L. Ed. 2d 631 (1981).

The trial court did not err when it denied the defendant's challenge of a juror for cause based on an alleged family relationship between the prosecutor's wife and the juror, where the evidence showed that the relationship between the juror and the deputy prosecuting attorney's wife was one merely of affinity, so distantly removed that the juror was not certain of its degree and could only guess that they were third cousins. *Miller v. State*, 8 Ark. App. 165, 649 S.W.2d 407 (1983).

The trial court did not err in refusing to grant a mistrial when, after the trial had commenced, a juror told the trial judge that he knew the prosecutrix where the juror stated that the prosecutrix had spoken to him during the lunch hour, that, after reflection, he had recalled meeting her three or four years earlier when he repaired a typewriter at the bank where she worked, that he had not seen her since that time, and that he could be a fair and impartial juror. *Clay v. State*, 290 Ark. 54, 716 S.W.2d 751 (1986).

Juror Improperly Excused.

Because the trial court (a) failed to make a finding, from all relevant circumstances, as to the sufficiency of the state's gender-neutral explanation, and then (b) failed to conduct a sensitive inquiry into the basis for each of the challenges by the state, the evidence did not establish that the state's challenges were for valid reasons without any gender bias; therefore, the defendant's constitutional rights had

not been protected and the trial court's error required a reversal and retrial. *Cleveland v. State*, 318 Ark. 738, 888 S.W.2d 629 (1994).

Juror Properly Excused.

Trial court did not abuse discretion in excusing venireperson, acquaintance of defendant's daughter, for cause. *Henry v. State*, 309 Ark. 1, 828 S.W.2d 346 (1992).

Refusal to Strike.

Petitioner was not denied his right to an impartial jury by the trial court's refusal to strike for cause a venireman whose mother had already been empaneled as a juror. The Arkansas trial and appellate courts found that the juror manifested no bias. *Moss v. Lockhart*, 971 F.2d 77 (8th Cir. 1992).

Silence of Juror.

Defendant failed to raise an issue of actual or implied bias, where his sole contention was that he was effectively denied the right to challenge the juror, either for cause or peremptorily, because of the juror's silence in response to the question whether he knew the defendant. *Sims v. State*, 266 Ark. 922, 587 S.W.2d 604 (Ct. App. 1979).

Standard.

The proper standard to be used in releasing a juror is whether the juror's views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and oath. *Williams v. State*, 288 Ark. 444, 705 S.W.2d 888 (1986).

Statement of Impartiality.

While a venireman is generally impartial when he states that he can put aside any preconceived opinions and give the accused the benefit of all doubts that the law requires, it is not an automatic cure-all for opinions, relationships or information that could disqualify one; some opinions and relationships cannot be overcome by a mere recitation by the prospective jurors that they will set aside objectionable factors. *Walton v. State*, 279 Ark. 193, 650 S.W.2d 231 (1983).

Cited: *Cotton v. State*, 256 Ark. 527, 508 S.W.2d 738 (1974); *Kirk v. State*, 270 Ark. 983, 606 S.W.2d 755 (1980); *Hulsey v. Sargent*, 821 F.2d 469 (8th Cir. 1987); *Noel v. State*, 28 Ark. App. 158, 771 S.W.2d 325 (1989); *Threlkeld v. Worsham*, 30 Ark. App. 251, 785 S.W.2d 249 (1990); *National Bank of Commerce v. Beavers*, 304 Ark. 81, 802 S.W.2d 132 (1990).

16-33-305. Challenge to trial jurors — Individual juror — Peremptory.

(a) The state shall be entitled to ten (10) peremptory challenges in prosecutions for capital murder, to six (6) peremptory challenges in prosecutions for all other felonies, and to three (3) peremptory challenges in prosecutions for misdemeanors.

(b) The defendant shall be entitled to twelve (12) peremptory challenges in prosecutions for capital murder, to eight (8) peremptory challenges in prosecutions for all other felonies, and to three (3) peremptory challenges in prosecutions for misdemeanors.

History. Init. Meas. 1936, No. 3, §§ 3997, 3998; Acts 1981, No. 115, § 1; §§ 17, 18, Acts 1937, p. 1384; Pope's Dig., A.S.A. 1947, §§ 43-1921, 43-1922.

CASE NOTES

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Challenges for cause.
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—Standard of review.
Examination.

• Explanation unnecessary.
Joinder.
Number of challenges.

In General.

There is no constitutional right to peremptory challenges. *Ruiz v. Norris*, 868 F. Supp. 1471 (E.D. Ark. 1994), aff'd, 71 F.3d

1404 (8th Cir. 1995), cert. denied, 519 U.S. 963, 117 S. Ct. 384, 136 L. Ed. 2d 301 (1996).

Burden of Proof.

In order to establish an equal protection violation, a defendant must establish a prima facie case of purposeful discrimination in the selection of the jury panel by showing that the prosecutor exercised peremptory challenges to remove members of a cognizable racial group from the venire, and that the facts and any other relevant circumstances raise an inference that the prosecutor used that practice to exclude the veniremen from the petit jury on account of their race; after a defendant establishes a prima facie case, the burden shifts to the government to articulate a neutral explanation related to the particular case to be tried. *Devose v. Norris*, 867 F. Supp. 836 (E.D. Ark. 1994), aff'd as modified, 53 F.3d 201 (8th Cir. 1995).

The mere articulation of a nondiscriminatory reason is not always sufficient for establishing a lack of purposeful discrimination; the court should look at all relevant circumstances to determine if the articulated reason is pretextual. *Devose v. Norris*, 867 F. Supp. 836 (E.D. Ark. 1994), aff'd as modified, 53 F.3d 201 (8th Cir. 1995).

Challenges for Cause.

Where the defendant claimed that he was forced to exercise two of his peremptory challenges to exclude two jurors who should have been excluded for cause, but he made no such record at the close of the jury voir dire, the defendant did not present any possible basis for finding two other jurors that the defendant was forced to accept to have been objectionable. *Watson v. State*, 289 Ark. 138, 709 S.W.2d 817 (1986).

Discrimination.

Prima facie case of purposeful discrimination may be made by showing that the totality of the relevant facts gives rise to an inference of discriminatory purpose, demonstrating total or seriously disproportionate exclusion of Negroes from jury venires, or showing a pattern of strikes, or questions and statements, by a prosecuting attorney during voir dire. *Ward v. State*, 293 Ark. 88, 733 S.W.2d 728 (1987). (But see *Colbert v. State*, 304 Ark. 250, 801 S.W.2d 643 (1990)). See also

MacKintrush v. State, 334 Ark. 390, 978 S.W.2d 293 (1998).

Where all of state's peremptory challenges were used to exclude black people and state's explanation was unsatisfactory, state was found to have intentionally used its peremptory challenges to keep black people from the jury. *Ward v. State*, 293 Ark. 88, 733 S.W.2d 728 (1987). (But see *Colbert v. State*, 304 Ark. 250, 801 S.W.2d 643 (1990)). See also *MacKintrush v. State*, 334 Ark. 390, 978 S.W.2d 293 (1998).

The presence of minority members on the jury, while by no means determinative of the question of whether discrimination occurred, is of some significance. *Thompson v. State*, 301 Ark. 488, 785 S.W.2d 29 (1990).

Where black jurors were seated on the jury, the prosecutor still had peremptory challenges remaining, and number of black persons serving on the jury was greater than the number struck by the prosecutor, defendant failed to establish a prima facie case of discrimination. *Thompson v. State*, 301 Ark. 488, 785 S.W.2d 29 (1990).

Upon a showing by a defendant of circumstances which raise an inference that the prosecutor exercised one or more of his peremptory challenges to exclude venire persons from the jury on account of race, the burden then shifts to the state to establish that the peremptory strike(s) were for racially neutral reasons. The trial court shall then determine from all relevant circumstances the sufficiency of the racially neutral explanation. Only if the state's explanation appears insufficient, must the trial court then conduct a sensitive inquiry into the basis for each of the challenges by the state. *Colbert v. State*, 304 Ark. 250, 801 S.W.2d 643 (1990).

The standard of review for reversal of a trial court's evaluation of the sufficiency of the state's racially neutral explanation of alleged discrimination must test whether the court's findings are clearly against a preponderance of the evidence. In every instance, however, the court shall state, in response to the defendant's objections, its ruling as to the sufficiency or insufficiency of the racially neutral explanation provided by the state. *Colbert v. State*, 304 Ark. 250, 801 S.W.2d 643 (1990).

Both in this case and in *Miller v. Lockhart*, 861 F. Supp. 1425 (E.D. Ark.

1994), the prosecutor consistently and systematically excluded African-Americans from participating as jurors through the use of peremptory challenges. *Ford v. Lockhart*, 861 F. Supp. 1447 (E.D. Ark. 1994), petition dismissed, *In re Norris*, 38 F.3d 1046 (8th Cir. 1994), *aff'd sub nom. Ford v. Norris*, 67 F.3d 162 (8th Cir. 1995).

The Equal Protection Clause forbids a prosecutor from using peremptory challenges to exclude otherwise qualified persons from the petit jury solely on account of their race. *Devose v. Norris*, 867 F. Supp. 836 (E.D. Ark. 1994), *aff'd as modified*, 53 F.3d 201 (8th Cir. 1995).

Habeas corpus petitioner established, at his state trial, a *prima facie* case of purposeful racial discrimination in the jury selection process and established that the state failed to articulate a believable neutral explanation for its strikes, thus violating petitioner's rights under the Equal Protection Clause. *Devose v. Norris*, 867 F. Supp. 836 (E.D. Ark. 1994), *aff'd as modified*, 53 F.3d 201 (8th Cir. 1995).

—Standard of Review.

A constitutional violation involving the selection of jurors in a racially discriminatory manner is a "structural defect" in the trial mechanism which cannot be subjected to a harmless error analysis. *Ford v. Norris*, 67 F.3d 162 (8th Cir. 1995).

Examination.

There was no error in a felony case whereby prospective jurors were questioned *voir dire* and subjected to challenges for cause and peremptory challenges two jurors at a time, as long as the state and the defendant were allowed to examine jurors individually and the state was required to exercise its peremptory challenges first. *Chenoweth v. State*, 291 Ark. 372, 724 S.W.2d 488 (1987).

The practice of allowing jurors to socialize with prosecutors and discuss the intricate interaction that occurs amongst jurors during deliberations, when the panel is still being used and the prosecutor can use such information in its selection of jurors in future cases, is troubling; the state certainly cannot rely upon such secret and undocumented, nebulous hearsay, referred to simply as "information," as a justification for the exercising of peremptory strikes against a cognizable racial group when the record discloses no

other significant nonracial distinctions between the jurors stricken and the jurors accepted. *Devose v. Norris*, 867 F. Supp. 836 (E.D. Ark. 1994), *aff'd as modified*, 53 F.3d 201 (8th Cir. 1995).

Explanation Unnecessary.

Where jurors were not excused for cause by the court but were peremptorily stricken by the state, no explanation was necessary as to why a potential juror was being excused. *Hill v. State*, 275 Ark. 71, 628 S.W.2d 284, cert. denied, 459 U.S. 882, 103 S. Ct. 180, 74 L. Ed. 2d 147 (1982).

No stated reason is necessary in exercising peremptory challenges. *Grigsby v. Mabry*, 758 F.2d 226 (8th Cir. 1985), *rev'd* on other grounds *sub nom. Lockhart v. McCree*, 476 U.S. 162, 106 S. Ct. 1758, 90 L. Ed. 2d 137 (1986).

Joinder.

The appellant, although jointly indicted for homicide with other defendants, had the right, upon request, to a separate trial, in which event he would have been individually entitled to exercise the right to allotted number of peremptory challenges in selecting a jury; but not having asked to sever, and having consented to a joint trial, the defense only had the right to exercise the statutory number of challenges without regard to the number of persons on trial as defendants. *Hearne v. State*, 121 Ark. 460, 181 S.W. 291 (1915) (decision under prior law).

Number of Challenges.

Where the accused, before the arraignment, had exercised some of his challenges, he was entitled thereafter only to the number of additional challenges necessary to make up the quota of challenges allowed to him by statute. *Herring v. State*, 170 Ark. 352, 280 S.W. 353 (1926) (decision under prior law).

Defendant charged with capital offense was entitled to number of challenges allotted for capital offenses even though the state waived the death penalty. *Tillman v. State*, 251 Ark. 896, 475 S.W.2d 529 (1972) (decision prior to 1981 amendment).

Trial judge may not increase the number of peremptory challenges in a noncapital felony case beyond the eight allowed under subsection (b). *Logan v. State*, 300 Ark. 35, 776 S.W.2d 341 (1989).

When more than one defendant is being

tried for capital murder, the number of peremptory challenges allotted to a side remains at twelve. *Ruiz v. Norris*, 868 F. Supp. 1471 (E.D. Ark. 1994), *aff'd*, 71 F.3d 1404 (8th Cir. 1995), *cert. denied*, 519 U.S. 963, 117 S. Ct. 384, 136 L. Ed. 2d 301 (1996).

Cited: *O'Neal v. State*, 195 Ark. 357, 112 S.W.2d 615 (1938); *Bowen v. State*, 205 Ark. 380, 168 S.W.2d 836 (1943); *Washington v. State*, 213 Ark. 218, 210 S.W.2d 307 (1948); *Edens v. State*, 235

Ark. 178, 359 S.W.2d 432 (1962); *Trotter v. State*, 237 Ark. 820, 377 S.W.2d 14, *cert. denied*, 379 U.S. 890, 85 S. Ct. 163, 13 L. Ed. 2d 94 (1964); *Stewart v. Stephens*, 244 F. Supp. 982 (E.D. Ark. 1965); *Brown v. State*, 239 Ark. 909, 395 S.W.2d 344 (1965); *Pickens v. State*, 6 Ark. App. 58, 638 S.W.2d 682 (1982); *Miller v. State*, 8 Ark. App. 165, 649 S.W.2d 407 (1983); *Gardner v. State*, 296 Ark. 41, 754 S.W.2d 518 (1988); *Franklin v. State*, 314 Ark. 329, 863 S.W.2d 268 (1993).

16-33-306. Challenge to trial jurors — Order.

The challenges of either party need not be all taken together, but may be taken separately, in the following order:

- (1) To the panel;
- (2) To the individual juror for general disqualification;
- (3) To the individual juror for implied bias;
- (4) To the individual juror for actual bias;
- (5) Peremptory.

History. *Crim. Code*, § 217, C. & M. Dig., § 3165; *Pope's Dig.*, § 4001; *A.S.A.* 1947, § 43-1925.

16-33-307. Challenge to trial jurors — Several defendants.

When several defendants are tried together, the challenge of any one (1) of the defendants shall be the challenge of all.

History. *Crim. Code*, § 200, C. & M. Dig., § 3169; *Pope's Dig.*, § 4005; *A.S.A.* 1947, § 43-1929.

CASE NOTES

ANALYSIS

In general.
Equal protection.
Number of challenges.

In General.

There is no constitutional right to peremptory challenges. *Ruiz v. Norris*, 868 F. Supp. 1471 (E.D. Ark. 1994), *aff'd*, 71 F.3d 1404 (8th Cir. 1995), *cert. denied*, 519 U.S. 963, 117 S. Ct. 384, 136 L. Ed. 2d 301 (1996).

Equal Protection.

The limitation of four defendants to a total of 12 peremptory challenges in the joint proceeding did not deny equal pro-

tection of the laws under the Fourteenth Amendment. *Orndorff v. Lockhart*, 707 F. Supp. 1062 (E.D. Ark. 1988), *modified*, 906 F.2d 1230 (8th Cir. 1990), *cert. denied*, 499 U.S. 931, 111 S. Ct. 1338, 113 L. Ed. 2d 269 (1991).

The fact that, had defendants been tried separately, each would have been entitled to twelve peremptory challenges, and the fact that they were limited to a total of twelve in the joint proceeding, did not deny them equal protection of the laws under the Fourteenth Amendment. *Ruiz v. Norris*, 868 F. Supp. 1471 (E.D. Ark. 1994), *aff'd*, 71 F.3d 1404 (8th Cir. 1995), *cert. denied*, 519 U.S. 963, 117 S. Ct. 384, 136 L. Ed. 2d 301 (1996).

Number of Challenges.

Defendants jointly charged with manslaughter were entitled to a total of eight challenges, not eight challenges for each defendant. *Lewis v. State*, 220 Ark. 914, 251 S.W.2d 490 (1952).

Where two defendants were being tried jointly for first-degree battery, they were entitled to only eight peremptory challenges as a pair, not eight challenges each.

Williams v. State, 267 Ark. 527, 593 S.W.2d 8 (1980).

When more than one defendant is being tried for capital murder, the number of peremptory challenges allotted to a side remains at twelve. *Ruiz v. Norris*, 868 F. Supp. 1471 (E.D. Ark. 1994), *aff'd*, 71 F.3d 1404 (8th Cir. 1995), *cert. denied*, 519 U.S. 963, 117 S. Ct. 384, 136 L. Ed. 2d 301 (1996).

16-33-308. Challenge to trial jurors — Hearing.

(a) Challenges shall be tried and determined by the court in a summary manner, without the issues of law or of fact arising thereon being reduced to writing.

(b) The juror himself may be examined on oath by either party upon challenge.

(c) Other witnesses may also be examined and their attendance coerced.

History. *Crim. Code*, §§ 213-215; *C. & M. Dig.*, §§ 3166-3168; *Pope's Dig.*, §§ 4002-4004; *A.S.A.* 1947, §§ 43-1926 — 43-1928.

CHAPTER 34**FEES AND EXPENSES****SECTION.**

16-34-101. Exceptions.

16-34-102. Compensation and reimbursement generally.

SECTION.

16-34-103. Per diem fees.

16-34-104. Mileage of unaccepted jurors.

16-34-105. Account for mileage.

Cross References. Deduction of jury fees from salary of public employee prohibited, § 21-5-104.

Effective Dates. Acts 1911, No. 89, § 6: effective on passage.

Acts 1917, No. 352, § 2: approved Mar. 24, 1917. Emergency declared.

Acts 1953, No. 46, § 5: Feb. 9, 1953. Emergency clause provided: "Whereas it has been ascertained by the Arkansas general assembly that the rate per day

being paid for jury service is wholly inadequate thereby forcing the jurors to serve at a financial loss, and there is urgent need for remedying this inequity which will be solved by the enactment of this bill. Therefore, an emergency is hereby declared to exist and this Act being necessary for the immediate preservation of the public peace, health and safety shall be in full force and effect from and after its passage and approval."

16-34-101. Exceptions.

The provisions of §§ 16-34-102, 16-34-104, and 16-34-105 shall not apply to Fulton County and Izard County.

History. Acts 1911, No. 89, § 5; 1917, No. 352, § 1; C. & M. Dig., § 4610; Pope's Dig., § 5699; A.S.A. 1947, § 39-306.

16-34-102. Compensation and reimbursement generally.

(a) Jurors' compensation and mileage shall be taxed as cost and paid by the unsuccessful party.

(b) Jurors who leave home and attend any court in pursuance of a summons shall be allowed the sum necessarily paid out for crossing any ferry or toll bridge in going to and returning from such court.

(c) The clerk shall give to each petit juror a certificate of his attendance and services as such juror.

(d) Any person who attends any court in this state as a juror in obedience to a summons, except people who are summoned among the bystanders at the court, and is from any cause not accepted on the jury shall receive the same fees for each day's attendance until excused or discharged as are allowed jurors in the court.

History. Acts 1911, No. 89, §§ 1, 4; C. & M. Dig., §§ 4605, 4606, 4609; Pope's Dig., §§ 5694, 5695, 5698; A.S.A. 1947, §§ 39-302, 39-305.

Publisher's Notes. Subsection (a) of this section applies only to county and probate courts. See Acts 1911, No. 89, § 1.

CASE NOTES

Purpose.

Circuit court does not have authority to tax jurors' fees as costs against the unsuccessful party, for the history of this section reveals that the legislative intent was to restrict the taxing of jurors' fees as costs to

county or probate proceedings where the utilization of jurors' services is infrequent. *Miller v. Scroggins*, 260 Ark. 685, 543 S.W.2d 476 (1976).

Cited: *Albritton v. Prudential Ins. Co.*, 1 Ark. App. 346, 615 S.W.2d 412 (1981).

16-34-103. Per diem fees.

Persons whose names appear on any legal and authorized grand jury or petit jury list of the respective counties of Arkansas shall receive in addition to any other fees allowable by law the following per diem fees:

- (1) When the person fails for any reason to attend court, none;
- (2) When the person attends court and is excused by the court for any reason from serving as a juror, a minimum of fifteen dollars (\$15.00); and
- (3) When the person has been sworn touching his qualifications to serve as a juror and has been accepted by the court as qualified, a minimum fee of thirty-five dollars (\$35.00).

History. Acts 1953, No. 46, § 2; 1977, No. 320, § 1; A.S.A. 1947, § 39-301; Acts 1999, No. 629, § 1.

Amendments. The 1999 amendment substituted "a minimum of fifteen dollars (\$15.00)" for "five dollars (\$5.00)" in (2);

substituted "a minimum fee of thirty-five dollars (\$35.00)" for "a maximum fee of twenty dollars (\$20.00), subject to the approval of the quorum court" in (3); and made stylistic changes.

16-34-104. Mileage of unaccepted jurors.

Any person who attends any court of record in the State of Arkansas as a juror in obedience to a summons, except such persons as are summoned among the bystanders at the court, and who for any cause is not accepted on the jury shall receive, in addition to per diem, mileage from and to his or her home by the most direct and practicable route at a rate to be prescribed by the quorum court of the county, but this rate is not to exceed the rate prescribed for state employees in state travel regulations.

History. Acts 1911, No. 89, § 2; C. & M. Dig., § 4607; Pope's Dig., § 5696; Acts 1983, No. 169, § 2; A.S.A. 1947, § 39-303.

16-34-105. Account for mileage.

Every account for mileage for jurors shall be made out at the same time and in the same manner as their per diem account is now made.

History. Acts 1911, No. 89, § 3; C. & M. Dig., § 4608; Pope's Dig., § 5697; A.S.A. 1947, § 39-304.

CHAPTERS 35-39

[Reserved]

SUBTITLE 4. EVIDENCE AND WITNESSES

CHAPTER 40

GENERAL PROVISIONS

SECTION.

- 16-40-101. Burden of proof.
- 16-40-102. Order of proof.
- 16-40-103. Modes of taking testimony of witnesses.

SECTION.

- 16-40-104. Judicial knowledge of laws of other states.
- 16-40-105. Death presumed after five years' absence.

Cross References. Admissibility of evidence and competency of witnesses in impeachment trials, § 21-12-206.

Evidence in military courts and tribunals, § 12-64-508.

Variance between pleading and proof, § 16-63-214.

RESEARCH REFERENCES

Am. Jur. 29 Am. Jur. 2d, Evid., § 1 et seq.
81 Am. Jur. 2d, Witnesses, § 75 et seq.

C.J.S. 31 C.J.S., Evid., § 1 et seq.
97 C.J.S., Witnesses, § 315 et seq.

16-40-101. Burden of proof.

(a) The party holding the affirmative of an issue must produce the evidence to prove it.

(b) The burden of proof in the whole action lies on the party who would be defeated if no evidence were given on either side.

History. Civil Code, §§ 578, 579; C. & M. Dig., §§ 4112, 4113; Pope's Dig., §§ 5121, 5122; A.S.A. 1947, §§ 28-101, 28-102.

RESEARCH REFERENCES

Ark. L. Rev. Evidence — Civil Procedure — Burden of Proof on Issue of Statute of Limitations, 4 Ark. L. Rev. 484.

Judicial Regulation of Procedure, 9 Ark. L. Rev. 146.

CASE NOTES

ANALYSIS

Conveyance.
Deceit.
Election contest.
Foreclosure.
Insanity.
Insurance.
Notes.
Personal injury.
Statute of limitations.
Warranty.
Will.

Conveyance.

In a suit to set aside an absolute conveyance, plaintiff claiming that it was the conveyance of his equity of redemption under a mortgage previously executed, a prima facie case is made by showing that it was an extinguishment of such equity, then the burden shifts to defendant to show that such a conveyance was free from fraud, oppression or undue influence. *Green v. Gilbert*, 169 Ark. 537, 276 S.W. 8 (1925).

Deceit.

In a suit for deceit brought to recover money alleged to have been secured by fraud the burden of proof is on the plaintiff as he is "the party who would be defeated if no evidence were given on either side." *Looney v. Potts*, 163 Ark. 310, 260 S.W. 23 (1924).

Election Contest.

Even though the proof connected the contestees with the spoilation of the poll books, this would not have relieved the

contestants of the burden of proving the allegations of their petition that the election returns were fraudulent and void. *Webb v. Bowden*, 124 Ark. 244, 187 S.W. 461 (1916).

Foreclosure.

Where the plaintiffs bring an action in chancery to restrain the foreclosure of a mortgage executed by their deceased parents, which mortgage is barred on its face by the statute of limitations, the burden is upon the plaintiffs to allege and prove facts sufficient to justify the court in granting the relief prayed. *Culberhouse v. Hawthorne*, 107 Ark. 462, 156 S.W. 421 (1913).

Insanity.

In a suit to cancel a deed and a mortgage on the ground of insanity, where the prima facie case made by showing that the plaintiff had been adjudged insane was overcome by the agreed statement of facts, the burden was on plaintiff to show insanity. *Field v. Koonce*, 178 Ark. 862, 12 S.W.2d 772 (1929).

Insurance.

Where a life insurance policy made payable to a bank as its interest may appear is, on the death of the insured, paid to the bank, an action brought by the deceased's administrator to recover on the policy alleging that deceased owed nothing at the time of his death and that payment to the bank was made in bad faith placed the burden on the administrator to prove these allegations by a preponderance of

the evidence. *Shelby v. Union Life Ins. Co.*, 177 Ark. 737, 7 S.W.2d 778 (1928).

Notes.

Where defendants, to whom widow had advanced money to pay note of her deceased husband under an agreement that they would probate and assign the claim to her, failed to do so, though admitting the agreement, the burden was on defendants. *Pearson v. Humphreys*, 170 Ark. 827, 281 S.W. 388 (1926).

In an action on a note given for corporate stock, where the defense is that the stock was sold in violation of the Blue Sky Law, the defendant has the burden of proof, entitling him to open and close the argument. *Kempner v. Stephens*, 186 Ark. 877, 56 S.W.2d 580 (1933).

In action on foreign judgment on a note defended on ground note was a forgery, refusal to permit defendant's counsel to open and close the argument to the jury was proper, since plaintiff had burden to prove genuineness of note, execution of which had been denied under oath; defendant had burden to prove affirmative plea that note was a forgery, but the burden on the whole was on plaintiff. *Motsinger v. Walker*, 205 Ark. 236, 168 S.W.2d 385 (1943).

Personal Injury.

In an action for damages for personal injuries, the burden is upon the plaintiff to show the fact of the injury by the

operation of the causative factor and the damages resulting therefrom. *Huckaby v. St. Louis, I.M. & S. Ry.*, 119 Ark. 179, 177 S.W. 923 (1915).

Statute of Limitations.

Whenever the bar of the statute of limitations does not appear from the pleadings and evidence on behalf of the plaintiff, the burden of proof is upon the defendant, who pleads the statute as a defense, to establish its application to bring him within its terms. *Alston v. Bitely*, 252 Ark. 79, 477 S.W.2d 446 (1972).

Warranty.

It is necessary for the buyer of a chattel to allege and prove, as a condition precedent to his right to recover on a warranty in the contract of sale, that he has complied with his part of the contract which was contained in the same writing with the warranty. *Williams v. Newkirk*, 121 Ark. 439, 181 S.W. 304 (1915).

Will.

That will contestants had good theory to prove invalidity of the will was not sufficient since they had burden to establish facts that would support that theory. *Chauvin v. Johnson*, 193 Ark. 600, 101 S.W.2d 432 (1937).

Cited: *Johnson v. Mitchell*, 164 Ark. 1, 260 S.W. 710 (1924); *Turner v. Rust*, 228 Ark. 528, 309 S.W.2d 731 (1958); *Vern Barnett Constr. Co. v. J.A. Hadley Constr. Co.*, 254 Ark. 866, 496 S.W.2d 446 (1973).

16-40-102. Order of proof.

The order of proof shall be regulated by the court so as to expedite the trial and enable the tribunal to obtain a clear view of the whole evidence. However, the party who begins the case must ordinarily exhaust his evidence before the other begins.

History. Civil Code, § 649; C. & M. Dig., § 4182; Pope's Dig., § 5192; A.S.A. 1947, § 28-103.

RESEARCH REFERENCES

Ark. L. Rev. Direct Examination of Witnesses, 15 Ark. L. Rev. 32.
Witnesses, 27 Ark. L. Rev. 229.

CASE NOTES

Discretion of Court.

As trial court has considerable discretion in regulating the mode and order of interrogation and presentation of proof, the court may allow a police officer, at the defendant's request, to return to the stand and testify, after his release from the

witness rule and in the interruption of the plaintiff's order of proof, in order to allow the officer to testify as to his qualifications in particular area of expertise. *Freeman v. Anderson*, 279 Ark. 282, 651 S.W.2d 450 (1983).

16-40-103. Modes of taking testimony of witnesses.

(a) The testimony of witnesses is taken in three (3) modes:

- (1) By affidavit;
- (2) By deposition;
- (3) By oral examination.

(b) An affidavit is a written declaration under oath, made without notice to the adverse party.

(c) A deposition is a written declaration under oath, made upon notice to the adverse party, for the purpose of enabling that party to attend and cross-examine; or upon written interrogatories.

(d) An oral examination is an examination in the presence of the tribunal which is to decide the fact or to act upon it, the testimony being heard by the tribunal from the lips of the witness.

History. Civil Code, §§ 596-599; C. & M. Dig., §§ 4195-4198; Pope's Dig., §§ 5206-5209; A.S.A. 1947, §§ 28-104 — 28-107.

CASE NOTES

ANALYSIS

Affidavits.

Expert witness.

Affidavits.

Although letters were not under oath, they could be attached as exhibits to verified petition for relief, but the letters did not become affidavits. *Jones v. Jones*, 51 Ark. App. 24, 907 S.W.2d 745 (1995), rev'd on other grounds, 326 Ark. 481, 931 S.W.2d 767 (1996).

Expert Witness.

Ex parte communication between an expert and the judge is improper, particularly if communications from the witness are not under oath. *Jones v. Jones*, 326 Ark. 481, 931 S.W.2d 767 (1996).

Cited: *Cox v. State*, 164 Ark. 126, 261 S.W. 303 (1924); *Thomas v. Hawkins*, 217 Ark. 787, 233 S.W.2d 247 (1950); *King v. Westlake*, 264 Ark. 555, 572 S.W.2d 841 (1978).

16-40-104. Judicial knowledge of laws of other states.

The courts of this state shall take judicial knowledge of the laws of other states.

History. Acts 1901, No. 98, § 1, p. 164; C. & M. Dig., § 4110; Pope's Dig., § 5119; A.S.A. 1947, § 28-109.

RESEARCH REFERENCES

Ark. L. Rev. Evidence — Proof of Statutory Law of Another State, 7 Ark. L. Rev. 66.

Documentary Evidence — Arkansas, 15 Ark. L. Rev. 79.

Uniform Interstate and International Procedure Act, 17 Ark. L. Rev. 118.

Legislative and Judicial Dynamism in Arkansas: Poisson v. d'Avril, 22 Ark. L. Rev. 724.

Judicial Notice, 27 Ark. L. Rev. 171.

CASE NOTES

ANALYSIS

Failure to take judicial notice.

Particular cases.

Proof.

Failure to Take Judicial Notice.

The jury was not qualified to categorize defendant's past violent behavior in North Carolina as a "prior violent felony" because the trial court took no judicial notice of North Carolina law and ignored defense counsel's request that the jury be instructed on North Carolina law. *Greene v. State*, 335 Ark. 1, 977 S.W.2d 192 (1998).

Particular Cases.

Judicial notice taken of laws of other states in particular cases. *Rice v. Metro-*

politan Life Ins. Co., 152 Ark. 498, 238 S.W. 772, 24 A.L.R. 143 (1922); *Rumph v. Lester Land Co.*, 205 Ark. 1147, 172 S.W.2d 916 (1943); *Great Am. Ins. Co. v. Stevens*, 178 Ark. 84, 10 S.W.2d 356 (1928); *Jones v. State*, 198 Ark. 354, 129 S.W.2d 249 (1939).

Proof.

It is only necessary to plead foreign law, not to prove it. *Wallis v. Mrs. Smith's Pie Co.*, 261 Ark. 622, 550 S.W.2d 453 (1977).

Cited: *J.R. Watkins Medical Co. v. Johnson*, 129 Ark. 384, 196 S.W. 465 (1917); *Bridgeman v. Gateway Ford Truck Sales*, 296 F. Supp. 233 (E.D. Ark. 1969).

16-40-105. Death presumed after five years' absence.

Any person absenting himself beyond the limits of this state for five (5) years successively shall be presumed to be dead in any case in which his death may come into question, unless proof is made that he was alive within that time.

History. Rev. Stat., ch. 46, § 1; C. & M. Dig., § 4111; Pope's Dig., § 5120; A.S.A. 1947, § 62-1601.

RESEARCH REFERENCES

Ark. L. Rev. Use of Presumptions in Arkansas, 4 Ark. L. Rev. 128.

CASE NOTES

ANALYSIS

Applicability.

Absence less than five years.

Burden of proof.

Presumption.

Suit for absentee.

Applicability.

This section applies only to residents of the state at time of their disappearance, and not to a resident who ceased to be such before his final disappearance. *Wilks v. Mutual Aid Union*, 135 Ark. 112, 204 S.W. 599 (1918); *Burnett v. Modern*

Woodmen of Am., 183 Ark. 729, 38 S.W.2d 24 (1931).

To bring a case within this section, the evidence must show that the insured was a resident of Arkansas. *Metropolitan Life Ins. Co. v. Williams*, 197 Ark. 883, 125 S.W.2d 441 (1939).

Absence Less Than Five Years.

There may be a proof of death by circumstantial evidence even though there was no absence for the length of time required to create a presumption of death under this section. *Mutual Life Ins. Co. v. Wilcoxon*, 187 Ark. 992, 63 S.W.2d 522 (1933).

Death of absentee might be proved by circumstantial evidence, but party alleging death before expiration of statutory period must prove facts and circumstances connected with absence of person warranting reasonable conclusion of death within shorter period. *Claywell v. Inter-Southern Life Ins. Co.*, 70 F.2d 569 (8th Cir. 1934).

Where nonresident was last heard from less than five years prior to institution of suit, no presumption of death existed upon the date the suit was commenced. *Allison v. Bush*, 201 Ark. 315, 144 S.W.2d 1087 (1940).

Burden of Proof.

Both the residence and the absence beyond the limits of the state must be proved and may be proved by circumstantial evidence, but neither death nor the fact of

absence can be inferred from the mere fact of disappearance. *Metropolitan Life Ins. Co. v. Williams*, 197 Ark. 883, 125 S.W.2d 441 (1939).

It is settled that neither the fact of death nor that of absence from the state can be inferred from the bare fact of a disappearance; petitioner has the burden of producing evidence from which the court might fairly conclude that absentee spouse had lived continuously outside the state for at least five years before the petitioner's second marriage. *Baxter v. Baxter*, 232 Ark. 151, 334 S.W.2d 714 (1960).

Presumption.

Evidence was sufficient to create a presumption of death under this section. *Metropolitan Life Ins. Co. v. Fry*, 184 Ark. 23, 41 S.W.2d 766 (1931).

Presumption does not arise until time limit required by this section had expired. *Aetna Life Ins. Co. v. Robertson*, 195 Ark. 237, 112 S.W.2d 436 (1937).

Suit for Absentee.

Wife could not sue for husband under this section where it was not proved that husband at time of disappearance was a resident of the state. *Edge v. Buschow Lumber Co.*, 218 Ark. 903, 239 S.W.2d 597 (1951).

Cited: *Southern Farm Bureau Life Ins. Co. v. Burney*, 590 F. Supp. 1016 (E.D. Ark. 1984).

CHAPTER 41

UNIFORM RULES OF EVIDENCE

SECTION.

16-41-101. Uniform Rules of Evidence.

A.C.R.C. Notes. Acts 1987, No. 834, provided that 1987 legislation reenacting acts passed in the 1976 Extended Session should not repeal any other 1987 legislation and that such other legislation would be controlling in the event of conflict.

Publisher's Notes. The Uniform Rules of Evidence, as enacted by Acts 1975 (Extended Sess., 1976), No. 1143, § 1, were held invalid by the Supreme Court of Arkansas in *Ricarte v. State*, 290 Ark. 100,

717 S.W.2d 488 (1986) on the ground that they were adopted by an unlawful session of the legislature. In that opinion and an accompanying *Per Curiam* of October 13, 1986, the court adopted the Uniform Rules of Evidence and renamed them the Arkansas Rules of Evidence. However, Acts 1987, No. 876, § 1, reenacted the Uniform Rules of Evidence; the Uniform Rules were also enacted as part of the adoption of the Arkansas Code of 1987

Annotated. Consequently, the legislatively enacted rules (Acts 1975 (Extended Sess. 1976), No. 1143, § 1, as amended and reenacted) are codified in this chapter. See the Court Rules volume for the Arkansas Rules of Evidence and for case notes construing the rules.

Effective Dates. Acts 1987, No. 876, § 3: Apr. 13, 1987. Emergency clause provided: "It is hereby found and determined by the General Assembly that because of the case *Ricarte v. State*, CR 86-31, a question has arisen over the validity of Act 1143 of the Extended Session of 1976; that this Act is a reenactment of the former law; and that the immediate passage of this Act is necessary to clarify the state of the law on this issue. Therefore, an emergency is hereby declared to exist, and this Act being necessary for the immediate preservation of the public peace, health and safety, shall be in full force and effect from and after its passage and approval."

Acts 1992 (1st Ex. Sess.), No. 66, § 5: Mar. 20, 1992. Emergency clause pro-

vided: "It is hereby found and determined by the General Assembly that the hearsay exception under 803(25) concerning statements made by a child under ten years of age concerning any act or offense against that child involving sexual offenses, child abuse or incest should be amended to reflect the criteria for determining trustworthiness as set forth in the United States Supreme Court decision of *Idaho v. Wright*, 110 S. Ct. 3139 (1990). It is determined by the General Assembly that the United States' Supreme Court's decision in *White v. Illinois*, No. 90-6113 (S. Ct. Jan. 15, 1992) foreclosed any rule requiring that as a necessary antecedent to the introduction of hearsay testimony, the prosecution must either produce the declarant at trial or show that the declarant is unavailable. Therefore, an emergency is hereby declared to exist and this act being necessary for the preservation of the public peace, health and safety shall be in full force and effect from and after its passage and approval."

RESEARCH REFERENCES

Ark. L. Notes. Gitelman, Commentary: How the Arkansas Supreme Court Raised the Dead, 1987 Ark. L. Notes 93.

Gitelman and Watkins, No Requiem for *Ricarte*: Separation of Powers, the Rules of Evidence, and the Rules of Civil Procedure, 1991 Ark. L. Notes 27.

UALR L.J. Survey—Evidence, 14 UALR L.J. 793.

Constitutional Law — Child Hearsay Exception in Sexual Abuse Cases — New Arkansas Supreme Court Rule Conflicts with New General Assembly Rule: Which Controls? Vann v. State, 309 Ark. 303, 831 S.W.2d 126 (1992), 15 UALR L.J. 143.

16-41-101. Uniform Rules of Evidence.

The "Uniform Rules of Evidence" in this chapter are adopted for proceedings in the courts of this state.

ARTICLE I

General Provisions

Rule 101. Scope. — These rules govern proceedings in the courts of this state to the extent and with the exceptions stated in Rule 1101.

Rule 102. Purpose and construction. — These rules shall be construed to secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence, to the end that the truth may be ascertained and proceedings justly determined.

Rule 103. Rulings on evidence. — (a) **EFFECT OF ERRONEOUS RULING.** Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and

(1) **OBJECTION.** In case the ruling is one admitting evidence, a timely objection or motion to strike appears of record, stating the specific ground of objection, if the specific ground was not apparent from the context; or

(2) **OFFER OF PROOF.** In case the ruling is one excluding evidence, the substance of the evidence was made known to the court by offer or was apparent from the context within which questions were asked.

(b) **RECORD OF OFFER AND RULING.** The court may add any other or further statement which shows the character of the evidence, the form in which it was offered, the objection made, and the ruling thereon. It may direct the making of an offer in question and answer form.

(c) **HEARING OF JURY.** In jury cases, proceedings shall be conducted, to the extent practicable, so as to prevent inadmissible evidence from being suggested to the jury by any means, such as making statements or offers of proof or asking questions in the hearing of the jury.

(d) **ERRORS AFFECTING SUBSTANTIAL RIGHTS.** Nothing in this rule precludes taking notice of errors affecting substantial rights although they were not brought to the attention of the court.

Rule 104. Preliminary questions. — (a) **QUESTIONS OF ADMISSIBILITY GENERALLY.** Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court, subject to the provisions of subdivision (b). In making its determination it is not bound by the rules of evidence except those with respect to privileges.

(b) **RELEVANCY CONDITIONED ON FACT.** Whenever the relevancy of evidence depends upon the fulfillment of a condition of fact, the court shall admit it upon, or in the court's discretion subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition.

(c) **HEARING OF JURY.** Hearings on the admissibility of confessions in criminal cases shall be conducted out of the hearing of the jury. Hearings on other preliminary matters in all cases shall be so conducted whenever the interests of justice require or, in criminal cases, whenever an accused is a witness, if he so requests.

(d) **TESTIMONY BY ACCUSED.** The accused does not, by testifying upon a preliminary matter, subject himself to cross-examination as to other issues in the case.

(e) **WEIGHT AND CREDIBILITY.** This rule does not limit the right of a party to introduce before the jury evidence relevant to weight or credibility.

Rule 105. Limited admissibility. — Whenever evidence which is admissible as to one party or for one purpose but not admissible as to another party or for another purpose is admitted, the court, upon request, shall restrict the evidence to its proper scope and instruct the jury accordingly.

Rule 106. Remainder of or related writings or recorded statements. — Whenever a writing or recorded statement or part thereof is

introduced by a party, an adverse party may require him at that time to introduce any other part or any other writing or recorded statement which in fairness ought to be considered contemporaneously with it.

ARTICLE II

Judicial Notice

Rule 201. Judicial notice of adjudicative facts. — (a) **SCOPE OF RULE.** This rule governs only judicial notice of adjudicative facts.

(b) **KINDS OF FACTS.** A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.

(c) **WHEN DISCRETIONARY.** A court may take judicial notice, whether requested or not.

(d) **WHEN MANDATORY.** A court shall take judicial notice if requested by a party and supplied with the necessary information.

(e) **OPPORTUNITY TO BE HEARD.** A party is entitled upon timely request to an opportunity to be heard as to the propriety of taking judicial notice and the tenor of the matter noticed. In the absence of prior notification, the request may be made after judicial notice has been taken.

(f) **TIME OF TAKING NOTICE.** Judicial notice may be taken at any stage of the proceeding.

(g) **INSTRUCTING JURY.** The court shall instruct the jury to accept as conclusive any fact judicially noticed.

ARTICLE III

Presumptions

Rule 301. Presumptions in general in civil actions and proceedings. — (a) **EFFECT.** In all actions and proceedings not otherwise provided for by statute or by these rules, a presumption imposes on the party against whom it is directed the burden of proving that the nonexistence of the presumed fact is more probable than its existence.

(b) **INCONSISTENT PRESUMPTIONS.** If presumptions are inconsistent, the presumption applies that is founded upon weightier considerations of policy. If considerations of policy are of equal weight neither presumption applies.

Rule 302. Applicability of federal law in civil actions and proceedings. — In civil actions and proceedings, the effect of a presumption respecting a fact which is an element of a claim or defense as to which federal law supplies the rule of decision is determined in accordance with federal law.

Rule 303. Presumptions in criminal cases. — (a) **SCOPE.** Except as otherwise provided by statute, in criminal cases, presumptions against an accused, recognized at common law or created by statute, including statutory provisions that certain facts are prima facie evidence of other facts or of guilt, are governed by this rule.

(b) **SUBMISSION TO JURY.** The court is not authorized to direct the jury to find a presumed fact against the accused. If a presumed fact establishes guilt or is an element of the offense or negatives a defense, the court may submit the question of guilt or of the existence of the presumed fact to the jury, but only if a reasonable juror on the evidence as a whole, including the evidence of the basic facts, could find guilt or the presumed fact beyond a reasonable doubt. If the presumed fact has a lesser effect, the question of its existence may be submitted to the jury provided the basic facts are supported by substantial evidence or are otherwise established, unless the court determines that a reasonable juror on the evidence as a whole could not find the existence of the presumed fact.

ARTICLE IV

Relevancy and Its Limits

Rule 401. Definition of “relevant evidence.” — “Relevant evidence” means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

Rule 402. Relevant evidence generally admissible — Irrelevant evidence inadmissible. — All relevant evidence is admissible, except as otherwise provided by statute or by these rules or by other rules applicable in the courts of this state. Evidence which is not relevant is not admissible.

Rule 403. Exclusion of relevant evidence on grounds of prejudice, confusion, or waste of time. — Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Rule 404. Character evidence not admissible to prove conduct — Exceptions — Other crimes. — (a) **CHARACTER EVIDENCE GENERALLY.** Evidence of a person’s character or a trait of his character is not admissible for the purpose of proving that he acted in conformity therewith on a particular occasion, except:

(1) **CHARACTER OF ACCUSED.** Evidence of a pertinent trait of his character offered by an accused, or by the prosecution to rebut the same;

(2) **CHARACTER OF VICTIM.** Evidence of a pertinent trait of character of the victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the victim offered by the prosecution in a homicide case to rebut evidence that the victim was the first aggressor;

(3) **CHARACTER OF WITNESS.** Evidence of the character of a witness, as provided in Rules 607, 608, and 609.

(b) **OTHER CRIMES, WRONGS, OR ACTS.** Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be

admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

Rule 405. Methods of proving character. — (a) REPUTATION OR OPINION. In all cases in which evidence of character or a trait of character of a person is admissible, proof may be made by testimony as to reputation or by testimony in the form of an opinion. On cross-examination, inquiry is allowable into relevant specific instances of conduct.

(b) SPECIFIC INSTANCES OF CONDUCT. In cases in which character or a trait of character of a person is an essential element of a charge, claim, or defense, proof may also be made of specific instances of his conduct.

Rule 406. Habit — Routine practice. — (a) ADMISSIBILITY. Evidence of the habit of a person or of the routine practice of an organization, whether corroborated or not and regardless of the presence of eyewitnesses, is relevant to prove that the conduct of the person or organization on a particular occasion was in conformity with the habit or routine practice.

(b) METHOD OF PROOF. Habit or routine practice may be proved by testimony in the form of an opinion or by specific instances of conduct sufficient in number to warrant a finding that the habit existed or that the practice was routine.

Rule 407. Subsequent remedial measures. — Whenever, after an event, measures are taken which, if taken previously, would have made the event less likely to occur, evidence of the subsequent measures is not admissible to prove negligence or culpable conduct in connection with the event. This rule does not require the exclusion of evidence of subsequent measures if offered for another purpose, such as proving ownership, control, or feasibility of precautionary measures, if controverted, or impeachment.

Rule 408. Compromise and offers to compromise. — Evidence of (1) furnishing, offering, or promising to furnish, or (2) accepting, offering, or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for, invalidity of, or amount of the claim or any other claim. Evidence of conduct or statements made in compromise negotiations is likewise not admissible. This rule does not require exclusion if the evidence is offered for another purpose, such as proving bias or prejudice of a witness, negating a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.

Rule 409. Payment of medical and similar expenses. — Evidence of furnishing, offering, or promising to pay medical, hospital, or similar expenses occasioned by an injury is not admissible to prove liability for the injury.

Rule 410. Withdrawn pleas and offers. — Evidence of a plea later withdrawn, of guilty, or admission of the charge, or nolo contendere, or of an offer so to plead to the crime charged or any other crime, or of

statements made in connection with any of the foregoing withdrawn pleas or offers, is not admissible in any civil or criminal action, case, or proceeding against the person who made the plea or offer.

Rule 411. [Reserved.]

ARTICLE V

Privileges

Rule 501. Privileges recognized only as provided. — Except as otherwise provided by constitution or statute or by these or other rules promulgated by the Supreme Court of this state, no person has a privilege to:

- (1) Refuse to be a witness;
- (2) Refuse to disclose any matter;
- (3) Refuse to produce any object or writing; or
- (4) Prevent another from being a witness or disclosing any matter or producing any object or writing.

Rule 502. Lawyer-client privilege. — (a) DEFINITIONS. As used in this rule:

(1) A “client” is a person, public officer, or corporation, association, or other organization or entity, either public or private, who is rendered professional legal services by a lawyer, or who consults a lawyer with a view to obtaining professional legal services from him.

(2) A “representative of the client” is one having authority to obtain professional legal services, or to act on advice rendered pursuant thereto, on behalf of the client.

(3) A “lawyer” is a person authorized, or reasonably believed by the client to be authorized, to engage in the practice of law in any state or nation.

(4) A “representative of the lawyer” is one employed by the lawyer to assist the lawyer in the rendition of professional legal services.

(5) A communication is “confidential” if not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication.

(b) GENERAL RULE OF PRIVILEGE. A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client (1) between himself or his representative and his lawyer or his lawyer’s representative, (2) between his lawyer and the lawyer’s representative, (3) by him or his representative or his lawyer or a representative of the lawyer to a lawyer or a representative of a lawyer representing another party in a pending action and concerning a matter of common interest therein, (4) between representatives of the client or between the client and a representative of the client, or (5) among lawyers and their representatives representing the same client.

(c) WHO MAY CLAIM THE PRIVILEGE. The privilege may be claimed by the client, his guardian or conservator, the personal representative of a

deceased client, or the successor, trustee, or similar representative of a corporation, association, or other organization, whether or not in existence. The person who was the lawyer or the lawyer's representative at the time of the communication is presumed to have authority to claim the privilege but only on behalf of the client.

(d) **EXCEPTIONS.** There is no privilege under this rule:

(1) **FURTHERANCE OF CRIME OR FRAUD.** If the services of the lawyer were sought or obtained to enable or aid anyone to commit or plan to commit what the client knew or reasonably should have known to be a crime or fraud;

(2) **CLAIMANTS THROUGH SAME DECEASED CLIENT.** As to a communication relevant to an issue between parties who claim through the same deceased client, regardless of whether the claims are by testate or intestate succession or by inter vivos transaction;

(3) **BREACH OF DUTY BY A LAWYER OR CLIENT.** As to a communication relevant to an issue of breach of duty by the lawyer to his client or by the client to his lawyer;

(4) **DOCUMENT ATTESTED BY A LAWYER.** As to a communication relevant to an issue concerning an attested document to which the lawyer is an attesting witness;

(5) **JOINT CLIENTS.** As to a communication relevant to a matter of common interest between or among two or more clients if the communication was made by any of them to a lawyer retained or consulted in common, when offered in an action between or among any of the clients;
or

(6) **PUBLIC OFFICER OR AGENCY.** As to a communication between a public officer or agency and its lawyers unless the communication concerns a pending investigation, claim, or action and the court determines that disclosure will seriously impair the ability of the public officer or agency to process the claim or conduct a pending investigation, litigation, or proceeding in the public interest.

Rule 503. Physician, psychotherapist, chiropractor-patient privilege.— (a) **DEFINITIONS.** As used in this rule:

(1) A “patient” is a person who consults or is examined or interviewed by a physician or psychotherapist.

(2) A “physician” is a person authorized to practice medicine in any state or nation, or reasonably believed by the patient so to be.

(3) A “psychotherapist” is (i) a person authorized to practice medicine in any state or nation, or reasonably believed by the patient so to be, while engaged in the diagnosis or treatment of a mental or emotional condition, including alcohol or drug addiction, or (ii) a person licensed or certified as a psychologist under the laws of any state or nation, while similarly engaged.

(4) A “chiropractor” is a person authorized to practice chiropractic in any state or nation, or reasonably believed by the patient so to be.

(5) A communication is “confidential” if not intended to be disclosed to third persons, except persons present to further the interest of the patient in the consultation, examination, or interview, persons reason-

ably necessary for the transmission of the communication, or persons who are participating in the diagnosis and treatment under the direction of the physician, psychotherapist, or chiropractor, including members of the patient's family.

(b) **GENERAL RULE OF PRIVILEGE.** A patient has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of diagnosis or treatment of his physical, mental, or emotional condition, including alcohol or drug addiction, among himself, a physician, psychotherapist, or chiropractor, and persons who are participating in the diagnosis or treatment under the direction of the physician, psychotherapist or chiropractor, including members of the patient's family.

(c) **WHO MAY CLAIM THE PRIVILEGE.** The privilege may be claimed by the patient, his guardian or conservator, or the personal representative of a deceased patient. The person who was the physician, psychotherapist, or chiropractor at the time of the communication is presumed to have authority to claim the privilege but only on behalf of the patient.

(d) **EXCEPTIONS:**

(1) **PROCEEDINGS FOR HOSPITALIZATION.** There is no privilege under this rule for communications relevant to an issue in proceedings to hospitalize the patient for mental illness, if the psychotherapist in the course of diagnosis or treatment has determined that the patient is in need of hospitalization.

(2) **EXAMINATION BY ORDER OF COURT.** If the court orders an examination of the physical, mental, or emotional condition of a patient, whether a party or a witness, communications made in the course thereof are not privileged under this rule with respect to the particular purpose for which the examination is ordered unless the court orders otherwise.

(3) **CONDITION AN ELEMENT OF CLAIM OR DEFENSE.** There is no privilege under this rule as to a communication relevant to an issue of the physical, mental, or emotional condition of the patient in any proceeding in which he relies upon the condition as an element of his claim or defense, or, after the patient's death, in any proceeding in which any party relies upon the condition as an element of his claim or defense.

Rule 504. Husband-wife privilege. — (a) **DEFINITION.** A communication is confidential if it is made privately by any person to his or her spouse and is not intended for disclosure to any other person.

(b) **GENERAL RULE OF PRIVILEGE.** An accused in a criminal proceeding has a privilege to prevent his spouse from testifying as to any confidential communication between the accused and the spouse.

(c) **WHO MAY CLAIM THE PRIVILEGE.** The privilege may be claimed by the accused or by the spouse on behalf of the accused. The authority of the spouse to do so is presumed.

(d) **EXCEPTIONS.** There is no privilege under this rule in a proceeding in which one spouse is charged with a crime against the person or property of (1) the other, (2) a child of either, (3) a person residing in the household of either, or (4) a third person committed in the course of committing a crime against any of them.

Rule 505. Religious privilege. — (a) **DEFINITIONS.** As used in this rule:

(1) A “clergyman” is a minister, priest, rabbi, accredited Christian Science practitioner, or other similar functionary of a religious organization, or an individual reasonably believed so to be by the person consulting him.

(2) A communication is “confidential” if made privately and not intended for further disclosure except to other persons present in furtherance of the purpose of the communication.

(b) **GENERAL RULE OF PRIVILEGE.** A person has a privilege to refuse to disclose and to prevent another from disclosing a confidential communication by the person to a clergyman in his professional character as spiritual adviser.

(c) **WHO MAY CLAIM THE PRIVILEGE.** The privilege may be claimed by the person, by his guardian or conservator, or by his personal representative if he is deceased. The person who was the clergyman at the time of the communication is presumed to have authority to claim the privilege but only on behalf of the communicant.

Rule 506. Political vote. — (a) **GENERAL RULE OF PRIVILEGE.** Every person has a privilege to refuse to disclose the tenor of his vote at a political election conducted by secret ballot.

(b) **EXCEPTIONS.** This privilege does not apply if the court finds that the vote was cast illegally or determines that the disclosure should be compelled pursuant to the election laws of the state.

Rule 507. Trade secrets. — A person has a privilege, which may be claimed by him or his agent or employee, to refuse to disclose and to prevent other persons from disclosing a trade secret owned by him, if the allowance of the privilege will not tend to conceal fraud or otherwise work injustice. If disclosure is directed, the court shall take such protective measures as the interest of the holder of the privilege and of the parties and the interests of justice require.

Rule 508. Secrets of state and other official information — Governmental privileges. — (a) If the law of the United States creates a governmental privilege that the courts of this state must recognize under the Constitution of the United States, the privilege may be claimed as provided by the law of the United States.

(b) No other governmental privilege is recognized except as created by the constitution or statutes of this state.

(c) **EFFECT OF SUSTAINING CLAIM.** If a claim of governmental privilege is sustained and it appears that a party is thereby deprived of material evidence, the court shall make any further orders the interests of justice require, including striking the testimony of a witness, declaring a mistrial, finding upon an issue as to which the evidence is relevant, or dismissing the action.

Rule 509. Identity of informer. — (a) **RULE OF PRIVILEGE.** The United States or a state or subdivision thereof has a privilege to refuse to disclose the identity of a person who has furnished information relating to or assisting in an investigation of a possible violation of a

law to a law enforcement officer or member of a legislative committee or its staff conducting an investigation.

(b) **WHO MAY CLAIM.** The privilege may be claimed by an appropriate representative of the public entity to which the information was furnished.

(c) **EXCEPTIONS:**

(1) **VOLUNTARY DISCLOSURE; INFORMER A WITNESS.** No privilege exists under this rule if the identity of the informer or his interest in the subject matter of his communication has been disclosed to those who would have cause to resent the communication by a holder of the privilege or by the informer's own action, or if the informer appears as a witness for the government.

(2) **TESTIMONY ON RELEVANT ISSUE.** If it appears in the case that an informer may be able to give testimony relevant to any issue in a criminal case or to a fair determination of a material issue on the merits in a civil case to which a public entity is a party, and the informed public entity invokes the privilege, the court shall give the public entity an opportunity to show in camera facts relevant to determining whether the informer can, in fact, supply that testimony. The showing will ordinarily be in the form of affidavits, but the court may direct that testimony be taken if it finds that the matter cannot be resolved satisfactorily upon affidavit. If the court finds there is a reasonable probability that the informer can give the testimony, and the public entity elects not to disclose his identity, in criminal cases the court on motion of the defendant or on its own motion shall grant appropriate relief, which may include one (1) or more of the following: requiring the prosecuting attorney to comply, granting the defendant additional time or a continuance, relieving the defendant from making disclosures otherwise required of him, prohibiting the prosecuting attorney from introducing specified evidence, and dismissing charges. In civil cases, the court may make any order the interests of justice require. Evidence submitted to the court shall be sealed and preserved to be made available to the appellate court in the event of an appeal, and the contents shall not otherwise be revealed without consent of the informed public entity. All counsel and parties are permitted to be present at every stage of proceedings under this subdivision except a showing in camera at which no counsel or party shall be permitted to be present.

Rule 510. Waiver of privilege by voluntary disclosure. — A person upon whom these rules confer a privilege against disclosure waives the privilege if he or his predecessor while holder of the privilege voluntarily discloses or consents to disclosure of any significant part of the privileged matter. This rule does not apply if the disclosure itself is privileged.

Rule 511. Privileged matter disclosed under compulsion or without opportunity to claim privilege. — A claim of privilege is not defeated by a disclosure which was (1) compelled erroneously or (2) made without opportunity to claim the privilege.

Rule 512. Comment upon or inference from claim of privilege — Instruction. — (a) **COMMENT OR INFERENCE NOT PERMITTED.** The claim of

a privilege, whether in the present proceeding or upon a prior occasion, is not a proper subject of comment by judge or counsel. No inference may be drawn therefrom.

(b) **CLAIMING PRIVILEGE WITHOUT KNOWLEDGE OF JURY.** In jury cases, proceedings shall be conducted, to the extent practicable, so as to facilitate the making of claims of privilege without the knowledge of the jury.

(c) **JURY INSTRUCTION.** Upon request, any party against whom the jury might draw an adverse inference from a claim or privilege is entitled to an instruction that no inference may be drawn therefrom.

ARTICLE VI

Witnesses

Rule 601. General rule of competency. — Every person is competent to be a witness except as otherwise provided in these rules.

Rule 602. Lack of personal knowledge. — A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that he has personal knowledge of the matter. Evidence to prove personal knowledge may, but need not, consist of the testimony of the witness himself. This rule is subject to the provisions of Rule 703, relating to opinion testimony by expert witnesses.

Rule 603. Oath or affirmation. — Before testifying, every witness shall be required to declare that he will testify truthfully, by oath or affirmation administered in a form calculated to awaken his conscience and impress his mind with his duty to do so.

Rule 604. Interpreters. — An interpreter is subject to the provisions of these rules relating to qualification as an expert and the administration of an oath or affirmation that he will make a true translation.

Rule 605. Competency of judge as witness. — The judge presiding at the trial may not testify in that trial as a witness. No objection need be made in order to preserve the point.

Rule 606. Competency of juror as witness. — (a) **AT THE TRIAL.** A member of the jury may not testify as a witness before that jury in the trial of the case in which he is sitting as a juror. If he is called so to testify, the opposing party shall be afforded an opportunity to object out of the presence of the jury.

(b) **INQUIRY INTO VALIDITY OF VERDICT OR INDICTMENT.** Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon his or any other juror's mind or emotions as influencing him to assent to or dissent from the verdict or indictment or concerning his mental processes in connection therewith, nor may his affidavit or evidence of any statement by him concerning a matter about which he would be precluded from testifying be received, but a juror may testify on the questions whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror.

Rule 607. Who may impeach. — The credibility of a witness may be attacked by any party, including the party calling him.

Rule 608. Evidence of character and conduct of witness. — (a) **OPINION AND REPUTATION EVIDENCE OF CHARACTER.** The credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation, but subject to these limitations: (1) the evidence may refer only to character for truthfulness or untruthfulness, and (2) evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise.

(b) **SPECIFIC INSTANCES OF CONDUCT.** Specific instances of the conduct of a witness, for the purpose of attacking or supporting his credibility, other than conviction of crime as provided in Rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning his character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.

The giving of testimony, whether by an accused or by any other witness, does not operate as a waiver of his privilege against self-incrimination when examined with respect to matters which relate only to credibility.

Rule 609. Impeachment by evidence of conviction of crime. — (a) **GENERAL RULE.** For the purpose of attacking the credibility of a witness, evidence that he has been convicted of a crime shall be admitted but only if the crime (1) was punishable by death or imprisonment in excess of one (1) year under the law under which he was convicted, and the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to a party or a witness, or (2) involved dishonesty or false statement, regardless of the punishment.

(b) **TIME LIMIT.** Evidence of a conviction under this rule is not admissible if a period of more than ten (10) years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for that conviction, whichever is the later date.

(c) **EFFECT OF PARDON, ANNULMENT, OR CERTIFICATE OF REHABILITATION.** Evidence of a conviction is not admissible under this rule if (1) the conviction has been the subject of a pardon, annulment, certificate of rehabilitation, or other equivalent procedure based on a finding of the rehabilitation of the person convicted, and that person has not been convicted of a subsequent crime which was punishable by death or imprisonment in excess of one (1) year, or (2) the conviction has been the subject of a pardon, annulment, or other equivalent procedure based on a finding of innocence.

(d) **JUVENILE ADJUDICATIONS.** Evidence of juvenile adjudications is generally not admissible under this rule. Except as otherwise provided by statute, however, the court may in a criminal case allow evidence of a

juvenile adjudication of a witness other than the accused if conviction of the offense would be admissible to attack the credibility of an adult and the court is satisfied that admission in evidence is necessary for a fair determination of the issue of guilt or innocence.

(e) **PENDENCY OF APPEAL.** The pendency of an appeal therefrom does not render evidence of a conviction inadmissible. Evidence of the pendency of an appeal is admissible.

Rule 610. Religious beliefs or opinions. — Evidence of the beliefs or opinions of a witness on matters of religion is not admissible for the purpose of showing that by reason of their nature his credibility is impaired or enhanced.

Rule 611. Mode and order of interrogation and presentation. — (a) **CONTROL BY COURT.** The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment.

(b) **SCOPE OF CROSS-EXAMINATION.** Cross-examination should be limited to the subject matter of the direct examination and matters affecting the credibility of the witness. The court may, in the exercise of discretion, permit inquiry into additional matters as if on direct examination.

(c) **LEADING QUESTIONS.** Leading questions should not be used on the direct examination of a witness except as may be necessary to develop his testimony. Ordinarily leading questions should be permitted on cross-examination. Whenever a party calls a hostile witness, an adverse party, or a witness identified with an adverse party, interrogation may be by leading questions.

Rule 612. Writing or object used to refresh memory. — (a) **WHILE TESTIFYING.** If, while testifying, a witness uses a writing or object to refresh his memory, an adverse party is entitled to have the writing or object produced at the trial, hearing, or deposition in which the witness is testifying.

(b) **BEFORE TESTIFYING.** If, before testifying, a witness uses a writing or object to refresh his memory for the purpose of testifying and the court in its discretion determines that the interests of justice so require, an adverse party is entitled to have the writing or object produced, if practicable, at the trial, hearing, or deposition in which the witness is testifying.

(c) **TERMS AND CONDITIONS OF PRODUCTION AND USE.** A party entitled to have a writing or object produced under this rule is entitled to inspect it, to cross-examine the witness thereon, and to introduce in evidence those portions which relate to the testimony of the witness. If production of the writing or object at the trial, hearing, or deposition is impracticable, the court may order it made available for inspection. If it is claimed that the writing or object contains matters not related to the subject matter of the testimony, the court shall examine the writing or object in camera, excise any portions not so related, and order delivery

of the remainder to the party entitled thereto. Any portion withheld over objections shall be preserved and made available to the appellate court in the event of an appeal. If a writing or object is not produced, made available for inspection, or delivered pursuant to order under this rule, the court shall make any order justice requires, but in criminal cases if the prosecution elects not to comply, the order shall be one striking the testimony or, if the court in its discretion determines that the interests of justice so require, declaring a mistrial.

Rule 613. Prior statements of witness. — (a) **EXAMINING WITNESS CONCERNING PRIOR STATEMENT.** In examining a witness concerning a prior statement made by him, whether written or not, the statement need not be shown nor its contents disclosed to him at that time, but on request the same shall be shown or disclosed to opposing counsel.

(b) **EXTRINSIC EVIDENCE OF PRIOR INCONSISTENT STATEMENT OF WITNESS.** Extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate him thereon, or the interests of justice otherwise require. This provision does not apply to admissions of a party-opponent as defined in Rule 801(d)(2).

Rule 614. Calling and interrogation of witnesses by court. — (a) **CALLING BY COURT.** The court, at the suggestion of a party or on its own motion, may call witnesses, and all parties are entitled to cross-examine witnesses thus called.

(b) **INTERROGATION BY COURT.** The court may interrogate witnesses, whether called by itself or by a party.

(c) **OBJECTIONS.** Objections to the calling of witnesses by court or to interrogation by it may be made at the time or at the next available opportunity when the jury is not present.

Rule 615. Exclusion of witnesses. — At the request of a party the court shall order witnesses excluded so that they cannot hear the testimony of other witnesses, and it may make the order of its own motion. This rule does not authorize exclusion of (1) a party who is a natural person, or (2) an officer or employee of a party that is not a natural person designated as its representative by its attorney, or (3) a person whose presence is shown by a party to be essential to the presentation of his cause.

Rule 616. Right of victim to be present at hearing. — Notwithstanding any provision to the contrary, in any criminal prosecution, the victim of a crime and in the event that the victim of a crime is a minor child under eighteen (18) years of age, that minor victim's parents, guardian, custodian or other person with custody of the alleged minor victim shall have the right to be present during any hearing, deposition, or trial of the offense.

ARTICLE VII

Opinions and Expert Testimony

Rule 701. Opinion testimony by lay witnesses. — If the witness is not testifying as an expert, his testimony in the form of opinions or inferences is limited to those opinions or inferences which are:

- (1) Rationally based on the perception of the witness; and
- (2) Helpful to a clear understanding of his testimony or the determination of a fact in issue.

Rule 702. Testimony by experts. — If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise.

Rule 703. Basis of opinion testimony by experts. — The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to him at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

Rule 704. Opinion on ultimate issue. — Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.

Rule 705. Disclosure of facts or data underlying expert opinion. — The expert may testify in terms of opinion or inference and give his reasons therefor without prior disclosure of the underlying facts or data, unless the court requires otherwise. The expert may in any event be required to disclose the underlying facts or data on cross-examination.

Rule 706. Court appointed experts. — (a) **APPOINTMENT.** The court, on motion of any party or its own motion, may enter an order to show cause why expert witnesses should not be appointed and may request the parties to submit nominations. The court may appoint any expert witnesses of its own selection. An expert witness shall not be appointed by the court unless he consents to act. A witness so appointed shall be informed of his duties by the court in writing, a copy of which shall be filed with the clerk, or at a conference in which the parties shall have opportunity to participate. A witness so appointed shall advise the parties of his findings, if any; his deposition may be taken by any party; and he may be called to testify by the court or any party. He shall be subject to cross-examination by each party, including a party calling him as a witness.

(b) **COMPENSATION.** Expert witnesses so appointed are entitled to reasonable compensation in whatever sum the court may allow. The compensation thus fixed is payable from funds which may be provided by law in criminal cases and civil actions and proceedings involving just compensation for the taking of property. In other civil actions and proceedings the compensation shall be paid by the parties in such

proportion and at such time as the court directs, and thereafter charged in like manner as other costs.

(c) **DISCLOSURE OF APPOINTMENT.** In the exercise of its discretion, the court may authorize disclosure to the jury of the fact that the court appointed the expert witness.

(d) **PARTIES' EXPERTS OF OWN SELECTION.** Nothing in this rule limits the parties in calling expert witnesses of their own selection.

ARTICLE VIII

Hearsay

Rule 801. Definitions. — The following definitions apply under this article:

(a) **STATEMENT.** A "statement" is:

(1) An oral or written assertion; or

(2) Nonverbal conduct of a person, if it is intended by him as an assertion.

(b) **DECLARANT.** A "declarant" is a person who makes a statement.

(c) **HEARSAY.** "Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

(d) **STATEMENTS WHICH ARE NOT HEARSAY.** A statement is not hearsay if:

(1) **PRIOR STATEMENT BY WITNESS.** The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is (i) inconsistent with his testimony and, if offered in a criminal proceeding, was given under oath and subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a disposition, or (ii) consistent with his testimony and is offered to rebut an express or implied charge against him of recent fabrication or improper influence or motive.

(2) **ADMISSION BY PARTY-OPPONENT.** The statement is offered against a party and is (i) his own statement, in either his individual or a representative capacity, (ii) a statement of which he has manifested his adoption or belief in its truth, (iii) a statement by a person authorized by him to make a statement concerning the subject, (iv) a statement by his agent or servant concerning a matter within the scope of his agency or employment, made during the existence of the relationship, or (v) a statement by a coconspirator of a party during the course and in furtherance of the conspiracy.

Rule 802. Hearsay rule. — Hearsay is not admissible except as provided by law or by these rules.

Rule 803. Hearsay exceptions — Availability of declarant immaterial. — The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

(1) **PRESENT SENSE IMPRESSION.** A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter.

(2) **EXCITED UTTERANCE.** A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.

(3) **THEN-EXISTING MENTAL, EMOTIONAL, OR PHYSICAL CONDITION.** A statement of the declarant's then-existing state of mind, emotion, sensation, or physical condition, such as intent, plan, motive, design, mental feeling, pain, and bodily health, but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will.

(4) **STATEMENTS FOR PURPOSES OF MEDICAL DIAGNOSIS OR TREATMENT.** Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensation, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.

(5) **RECORDED RECOLLECTION.** A memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable him to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in his memory and to reflect that knowledge correctly. If admitted, the memorandum or record may be read into evidence but may not itself be received as an exhibit unless offered by an adverse party.

(6) **RECORDS OF REGULARLY CONDUCTED BUSINESS ACTIVITY.** A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term "business" as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

(7) **ABSENCE OF ENTRY IN RECORDS KEPT IN ACCORDANCE WITH THE PROVISIONS OF PARAGRAPH (6).** Evidence that a matter is not included in the memoranda, reports, records, or data compilations, in any form, kept in accordance with the provisions of paragraph (6), to prove the nonoccurrence or nonexistence of the matter, if the matter was of a kind of which a memorandum, report, record, or data compilation was regularly made and preserved, unless the sources of information or other circumstances indicate lack of trustworthiness.

(8) **PUBLIC RECORDS AND REPORTS.** To the extent not otherwise provided in this paragraph, records, reports, statements, or data compilations in any form of a public office or agency setting forth its regularly conducted and regularly recorded activities, or matters observed pur-

suant to duty imposed by law and as to which there was a duty to report, or factual findings resulting from an investigation made pursuant to authority granted by law. The following are not within this exception to the hearsay rule: (i) investigative reports by police and other law enforcement personnel; (ii) investigative reports prepared by or for a government, a public office, or an agency when offered by it in a case in which it is a party; (iii) factual findings offered by the government in criminal cases; (iv) factual findings resulting from special investigation of a particular complaint, case, or incident; and (v) any matter as to which the sources of information or other circumstances indicate lack of trustworthiness.

(9) **RECORDS OF VITAL STATISTICS.** Records or data compilations, in any form, of birth, fetal deaths, deaths, or marriages, if the report thereof was made to a public office pursuant to requirements of law.

(10) **ABSENCE OF PUBLIC RECORDS OR ENTRY.** To prove the absence of a record, report, statement, or data compilation, in any form, or the nonoccurrence or nonexistence of a matter of which a record, report, statement, or data compilation, in any form, was regularly made and preserved by a public office or agency, evidence in the form of a certification in accordance with Rule 902, or testimony, that diligent search failed to disclose the record, report, statement, or data compilation, or entry.

(11) **RECORDS OF RELIGIOUS ORGANIZATIONS.** Statements of births, marriages, divorces, death, legitimacy, ancestry, relationship by blood or marriage, or other similar facts of personal or family history, contained in a regularly kept record of a religious organization.

(12) **MARRIAGE, BAPTISMAL, AND SIMILAR CERTIFICATES.** Statements of fact contained in a certificate that the maker performed a marriage or other ceremony or administered a sacrament, made by a clergyman, public official, or other person authorized by the rules or practices of a religious organization or by law to perform the act certified, and purporting to have been issued at the time of the act or within a reasonable time thereafter.

(13) **FAMILY RECORDS.** Statements of fact concerning personal or family history contained in family Bibles, genealogies, charts, engravings on rings, inscriptions on family portraits, engravings on urns, crypts, or tombstones, or the like.

(14) **RECORDS OF DOCUMENTS AFFECTING AN INTEREST IN PROPERTY.** The record of a document purporting to establish or affect an interest in property, as proof of the content of the original recorded document and its execution and delivery by each person by whom it purports to have been executed, if the record is a record of a public office and applicable statute authorizes the recording of documents of that kind in that office.

(15) **STATEMENTS IN DOCUMENTS AFFECTING AN INTEREST IN PROPERTY.** A statement contained in a document purporting to establish or affect an interest in property if the matter stated was relevant to the purpose of the document, unless dealings with the property since the document was made have been inconsistent with the truth of the statement or the purport of the document.

(16) **STATEMENTS IN ANCIENT DOCUMENTS.** Statements in a document in existence twenty years or more the authenticity of which is established.

(17) **MARKET REPORTS, COMMERCIAL PUBLICATIONS.** Market quotations, tabulations, lists, directories, or other published compilations, generally used and relied upon by the public or by persons in particular occupations.

(18) **LEARNED TREATISES.** To the extent called to the attention of an expert witness upon cross-examination or relied upon by him in direct examination, statements contained in published treatises, periodicals, or pamphlets on a subject of history, medicine, or other science or art, established as a reliable authority by testimony or admission of the witness or by other expert testimony or by judicial notice. If admitted, the statements may be read into evidence but may not be received as exhibits.

(19) **REPUTATION CONCERNING PERSONAL OR FAMILY HISTORY.** Reputation among members of his family by blood, adoption, or marriage, or among his associates, or in the community, concerning a person's birth, adoption, marriage, divorce, death, legitimacy, relationship by blood, adoption, or marriage, ancestry, or other similar fact of his personal or family history.

(20) **REPUTATION CONCERNING BOUNDARIES OR GENERAL HISTORY.** Reputation in a community, arising before the controversy, as to boundaries of or customs affecting lands in the community, and reputation as to events of general history important to the community or state or nation in which located.

(21) **REPUTATION AS TO CHARACTER.** Reputation of a person's character among his associates or in the community.

(22) **JUDGMENT OF PREVIOUS CONVICTION.** Evidence of a final judgment, entered after a trial or upon a plea of guilty, adjudging a person guilty of a crime punishable by death or imprisonment in excess of one (1) year, to prove any fact essential to sustain the judgment, but not including, when offered by the state in a criminal prosecution for purposes other than impeachment, judgments against persons other than the accused. The pendency of an appeal may be shown but does not affect admissibility.

(23) **JUDGMENT AS TO PERSONAL, FAMILY, OR GENERAL HISTORY, OR BOUNDARIES.** Judgments as proof of matters of personal, family, or general history, or boundaries, essential to the judgment, if the same would be provable by evidence of reputation.

(24) **OTHER EXCEPTIONS.** A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (i) the statement is offered as evidence of a material fact; (ii) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (iii) the general purposes of these rules and the interest of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the

proponent of it makes known to the adverse party sufficiently in advance to provide the adverse party with a fair opportunity to prepare to meet it, his intention to offer the statement and the particulars of it, including the name and address of the declarant.

(25) A statement made by a child under ten (10) years of age concerning any act or offense against that child involving sexual offenses, child abuse, or incest is admissible in any criminal proceeding in a court of this state, provided:

1. The court finds, in a hearing conducted outside the presence of the jury, that the statement offered possesses a reasonable likelihood of trustworthiness using the following criteria:

- a. the spontaneity and consistency of repetition of the statement by the child;
- b. the mental state of the child;
- c. the child's use of terminology unexpected of a child of similar age;
- d. the lack of a motive by the child to fabricate the statement.

2. Before the hearsay testimony is admitted by the court and without regard to the determination of competency, the court will examine the child on the record in camera. This examination shall be considered along with the criteria set forth in subdivisions (25)1.a.- d. as to the admissibility of the hearsay statements. The court shall not require this examination nor shall it require the attendance of the child at the hearing if the court determines the examination and attendance will be against the best interest of the child.

3. The proponent of the statement shall give the adverse party reasonable notice of his intention to offer the statement and the particulars of the statement.

4. This section shall not be construed to limit the admission of an offered statement under any other hearsay exception or applicable rule of evidence.

Rule 804. Hearsay exceptions — Declarant unavailable. — (a) **DEFINITION OF UNAVAILABILITY.** "Unavailability as a witness" includes situations in which the declarant:

(1) Is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of his statement;

(2) Persists in refusing to testify concerning the subject matter of his statement despite an order of the court to do so;

(3) Testifies to a lack of memory of the subject matter of his statement;

(4) Is unable to be present or to testify at the hearing because of death or then-existing physical or mental illness or infirmity; or

(5) Is absent from the hearing and the proponent of his statement has been unable to procure his attendance, or in the case of a hearsay exception under subdivision (b)(2), (3), or (4), his attendance or testimony, by process or other reasonable means.

A declarant is not unavailable as a witness if his exemption, refusal, claim of lack of memory, inability, or absence is due to the procurement

or wrongdoing of the proponent of his statement for the purpose of preventing the witness from attending or testifying.

(b) **HEARSAY EXCEPTIONS.** The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

(1) **FORMER TESTIMONY.** Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.

(2) **STATEMENT UNDER BELIEF OF IMPENDING DEATH.** A statement made by a declarant while believing that his death was imminent, concerning the cause or circumstances of what he believed to be his impending death.

(3) **STATEMENT AGAINST INTEREST.** A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject him to civil or criminal liability or to render invalid a claim by him against another or to make him an object of hatred, ridicule, or disgrace, that a reasonable man in his position would not have made the statement unless he believed it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement. A statement or confession offered against the accused in a criminal case, made by a codefendant or other person implicating both himself and the accused, is not within this exception.

(4) **STATEMENT OF PERSONAL OR FAMILY HISTORY.** (i) A statement concerning the declarant's own birth, adoption, marriage, divorce, legitimacy, relationship by blood, adoption, marriage, ancestry, or other similar fact of personal or family history, even though declarant had no means of acquiring personal knowledge of the matter stated; or (ii) a statement concerning the foregoing matters and death also, of another person, if the declarant was related to the other by blood, adoption, or marriage or was so intimately associated with the other's family as to be likely to have accurate information concerning the matter declared.

(5) **OTHER EXCEPTIONS.** A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (i) the statement is offered as evidence of a material fact; (ii) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (iii) the general purposes of these rules and the interests of justice will best be served by admission of the statements into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance to provide the adverse party with a fair opportunity to prepare to meet it, his intention to offer the statement and the particulars of it, including the name and address of the declarant.

Rule 805. Hearsay within hearsay. — Hearsay included within hearsay is not excluded under the hearsay rule if each part of the combined statements conforms with an exception to the hearsay rule provided in these rules.

Rule 806. Attacking and supporting credibility of declarant. — If a hearsay statement, or a statement defined in Rule 801(d) (2) (iii), (iv), or (v), has been admitted in evidence, the credibility of the declarant may be attacked, and if attacked may be supported, by any evidence which would be admissible for those purposes if declarant had testified as a witness. Evidence of a statement or conduct by the declarant at any time, inconsistent with his hearsay statement, is not subject to any requirement that he may have been afforded an opportunity to deny or explain. If the party against whom a hearsay statement has been admitted calls the declarant as a witness, the party is entitled to examine him on the statement as if under cross-examination.

ARTICLE IX

Authentication and Identification

Rule 901. Requirement of authentication or identification. — (a) **GENERAL PROVISION.** The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.

(b) **ILLUSTRATIONS.** By way of illustration only, and not by way of limitation, the following are examples of authentication or identification conforming with the requirements of this rule:

(1) **TESTIMONY OF WITNESS WITH KNOWLEDGE.** Testimony of a witness with knowledge that a matter is what it is claimed to be.

(2) **NONEXPERT OPINION ON HANDWRITING.** Nonexpert opinion as to the genuineness of handwriting, based upon familiarity not acquired for purposes of the litigation.

(3) **COMPARISON BY TRIER OR EXPERT WITNESS.** Comparison by the trier of fact or by expert witnesses with specimens which have been authenticated.

(4) **DISTINCTIVE CHARACTERISTICS AND THE LIKE.** Appearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with circumstances.

(5) **VOICE IDENTIFICATION.** Identification of a voice, whether heard firsthand or through mechanical or electronic transmission or recording, by opinion based upon hearing the voice at any time under circumstances connecting it with the alleged speaker.

(6) **TELEPHONE CONVERSATIONS.** Telephone conversations, by evidence that a call was made to the number assigned at the time by the telephone company to a particular person or business, if (i) in the case of a person, circumstances, including self-identification, show the person answering to be the one called, or (ii) in the case of a business,

the call was made to a place of business and the conversation related to business reasonably transacted over the telephone.

(7) **PUBLIC RECORDS OR REPORTS.** Evidence that a writing authorized by law to be recorded or filed and in fact recorded or filed in a public office, or a purported public record, report, statement, or data compilation, in any form, is from the public office where items of this nature are kept.

(8) **ANCIENT DOCUMENTS OR DATA COMPILATION.** Evidence that a document or data compilation, in any form, (i) is in such condition as to create no suspicion concerning its authenticity, (ii) was in a place where it, if authentic, would likely be, and (iii) has been in existence twenty (20) years or more at the time it is offered.

(9) **PROCESS OR SYSTEM.** Evidence describing a process or system used to produce a result and showing that the process or system produces an accurate result.

(10) **METHODS PROVIDED BY STATUTE OR RULE.** Any method of authentication or identification provided by the Supreme Court of this state or by a statute or as provided in the Constitution of this state.

Rule 902. Self-authentication. — Extrinsic evidence of authenticity as a condition precedent to admissibility is not required with respect to the following:

(1) **DOMESTIC PUBLIC DOCUMENTS UNDER SEAL.** A document bearing a seal purporting to be that of the United States, or of any state, district, commonwealth, territory, or insular possession thereof, or the Panama Canal Zone, or the Trust Territory of the Pacific Islands, or of a political subdivision, department, officer, or agency thereof, and a signature purporting to be an attestation or execution.

(2) **DOMESTIC PUBLIC DOCUMENTS NOT UNDER SEAL.** A document purporting to bear the signature in his official capacity of an officer or employee of any entity included in paragraph (1), having no seal, if a public officer having a seal and having official duties in the district political subdivision of the officer or employee certifies under seal or that the signer has the official capacity and that the signature is genuine.

(3) **FOREIGN PUBLIC DOCUMENTS.** A document purporting to be executed or attested in his official capacity by a person authorized by the laws of a foreign country to make the execution or attestation, and accompanied by a final certification as to the genuineness of the signature and official position (i) of the executing or attesting person, or (ii) of any foreign official whose certificate of genuineness of signature and official position relates to the execution or attestation or is in a chain of certificate of genuineness of signature and official position relating to the execution or attestation. A final certification may be made by a secretary of embassy or legation, consul general, consul, vice consul, or consular agent of the United States or a diplomatic or consular official of the foreign country assigned or accredited to the United States. If reasonable opportunity has been given to all parties to investigate the authenticity and accuracy of official documents, the court may for good cause shown order that they be treated as presumptively authentic

without final certification or permit them to be evidenced by an attested summary with or without final certification.

(4) **CERTIFIED COPIES OF PUBLIC RECORDS.** A copy of an official record or report or entry therein, or of a document authorized by law to be recorded or filed and actually recorded or filed in a public office, including data compilations in any form, certified as correct by the custodian or other person authorized to make the certification, by certificate complying with paragraph (1), (2), or (3), or complying with any law of the United States or of this state.

(5) **OFFICIAL PUBLICATIONS.** Books, pamphlets, or other publications issued by public authority.

(6) **NEWSPAPERS AND PERIODICALS.** Printed material purporting to be newspapers or periodicals.

(7) **TRADE INSCRIPTIONS AND THE LIKE.** Inscriptions, signs, tags, or labels purporting to have been affixed in the course of business and indicating ownership, control, or origin.

(8) **ACKNOWLEDGED DOCUMENTS.** Documents accompanied by a certificate of acknowledgement executed in the manner provided by law by a notary public or other officer authorized by law to take acknowledgments.

(9) **COMMERCIAL PAPER AND RELATED DOCUMENTS.** Commercial paper, signatures thereon, and documents relating thereto to the extent provided by general commercial law.

(10) **PRESUMPTIONS CREATED BY LAW.** Any signature, document, or other matter declared by any law of the United States or of this state, to be presumptively or prima facie genuine or authentic.

Rule 903. Subscribing witness' testimony unnecessary. — The testimony of a subscribing witness is not necessary to authenticate a writing unless required by the laws of the jurisdiction whose laws govern the validity of the writing.

ARTICLE X

Contents of Writings, Recordings, and Photographs

Rule 1001. Definitions. — For purposes of this article the following definitions are applicable:

(1) **WRITINGS AND RECORDINGS.** "Writings" and "recordings" consist of letters, words, sounds, or numbers, or their equivalent, set down by handwriting, typewriting, printing, photostating, photographing, magnetic impulse, mechanical or electronic recording, optical disk imaging, or other form of data compilation.

(2) **PHOTOGRAPHS.** "Photographs" include still photographs, X-ray films, videotapes, and motion pictures.

(3) **ORIGINAL.** An "original" of a writing or recording is the writing or recording itself or any counterpart intended to have the same effect by a person executing or issuing it. An "original" of a photograph includes the negative or any print therefrom. If data are stored in a computer or similar device, any printout or other output readable by sight, shown to reflect the data accurately, is an "original."

(4) **DUPLICATE.** A "duplicate" is a counterpart produced by the same impression as the original, or from the same matrix, or by means of photography, including enlargements and miniatures, or by mechanical or electronic re-recording, or by chemical reproduction, or by an optical disk imaging system, or by other equivalent techniques which accurately reproduce the original.

Rule 1002. Requirement of original. — To prove the content of a writing, recording, or photograph, the original writing, recording, or photograph is required, except as otherwise provided in these rules or by rules adopted by the Supreme Court of this state or by statute.

Rule 1003. Admissibility of duplicates. — A duplicate is admissible to the same extent as an original unless (1) a genuine question is raised as to the authenticity or continuing effectiveness of the original or (2) in the circumstances it would be unfair to admit the duplicate in lieu of the original.

Rule 1004. Admissibility of other evidence of contents. — The original is not required, and other evidence of the contents of a writing, recording, or photograph is admissible if:

(1) **ORIGINALS LOST OR DESTROYED.** All originals are lost or have been destroyed, unless the proponent lost or destroyed them in bad faith;

(2) **ORIGINAL NOT OBTAINABLE.** No original can be obtained by any available judicial process or procedure;

(3) **ORIGINAL IN POSSESSION OF OPPONENT.** At a time when an original was under the control of the party against whom offered, he was put on notice, by the pleadings or otherwise, that the contents would be a subject of proof at the hearing; and he does not produce the original at the hearing; or

(4) **COLLATERAL MATTERS.** The writing, recording, or photograph is not closely related to a controlling issue.

Rule 1005. Public records. — The contents of an official record, or of a document authorized to be recorded or filed and actually recorded or filed, including data compilations in any form, if otherwise admissible, may be proved by copy, certified as correct in accordance with Rule 902 or testified to be correct by a witness who has compared it with the original. If a copy complying with the foregoing cannot be obtained by the exercise of reasonable diligence, other evidence of the contents may be admitted.

Rule 1006. Summaries. — The contents of voluminous writings, recordings, or photographs which cannot conveniently be examined in court may be presented in the form of a chart, summary, or calculation. The originals, or duplicates, shall be made available for examination or copying, or both, by other parties at a reasonable time and place. The court may order that they be produced in court.

Rule 1007. Testimony or written admission of party. — Contents of writings, recordings, or photographs may be proved by the testimony or deposition of the party against whom offered or by his written admission, without accounting for the nonproduction of the original.

Rule 1008. Functions of court and jury. — Whenever the admissibility of other evidence of contents of writings, recordings, or photographs under these rules depends upon the fulfillment of a condition of fact, the question whether the condition has been fulfilled is ordinarily for the court to determine in accordance with the provisions of Rule 104. However, when an issue is raised whether (1) the asserted writing ever existed, or (2) another writing, recording, or photograph produced at the trial is the original, or (3) other evidence of contents correctly reflects the contents, the issue is for the trier of fact to determine as in the case of other issues of fact.

ARTICLE XI

Miscellaneous Rules

Rule 1101. Rules applicable. — (a) Except as otherwise provided in subdivision (b), these rules apply to all actions and proceedings in the courts of this state.

(b) **RULES INAPPLICABLE.** The rules other than those with respect to privileges do not apply in the following situations:

(1) **PRELIMINARY QUESTIONS OF FACT.** The determination of questions of fact preliminary to admissibility of evidence when the issue is to be determined by the court under Rule 104(a).

(2) **GRAND JURY.** Proceedings before grand juries.

(3) **MISCELLANEOUS PROCEEDINGS.** Proceedings for extradition or rendition; preliminary examination detention hearing in criminal cases; sentencing, or granting or revoking probation; issuance of warrants for arrest, criminal summonses, and search warrants; and proceedings with respect to release on bail or otherwise.

(4) Contempt proceedings in which the court may act summarily.

Rule 1102. Title. — These rules shall be known and may be cited as Uniform Rules of Evidence.

History. Acts 1975 (Extended Sess. 1976), No. 1143, § 1; 1985, No. 405, § 1; 1985, No. 462, § 1; reen. Acts 1987, No. 876, § 1; A.S.A. 1947, § 28-1001; Acts 1991, No. 361, § 1; 1992 (1st Ex. Sess.), No. 66, § 1; 1997, No. 794, § 1.

A.C.R.C. Notes. Rule 503 of the Arkansas Rules of Evidence was also amended by the Per Curiam Order of the Supreme Court of Arkansas dated May 13, 1991, and effective July 1, 1991.

Rule 803(25) of the Arkansas Rules of Evidence has been amended by Per Cu-

riam Order of the Supreme Court of Arkansas, dated May 11, 1992. The amendments to Rule 803(25) by Acts 1992 (1st Ex. Sess.), No. 66, § 1, and by the Per Curiam Order dated May 11, 1992 are not identical.

Publisher's Notes. For the Arkansas Rules of Evidence, including Evid. Rule 1001(4), see the Rules Volume.

Amendments. The 1997 amendment inserted "optical disk imaging" in Rule 1001(1); and inserted "or by an optical disk imaging system" in Rule 1001(4).

CHAPTER 42

SEXUAL OFFENSES

SECTION.

16-42-101. Admissibility of evidence of victim's prior sexual conduct.

16-42-102. Presence of parent or custo-

dian at proceedings involving minor sexual assault victims.

Effective Dates. Acts 1977, No. 197, § 5: Feb. 18, 1977. Emergency clause provided: "It has been found and is declared by the General Assembly of Arkansas that the introduction of opinion evidence, reputation evidence, and evidence of specific instances of the victim's prior sexual conduct with the defendant or any other person, where such evidence does not directly pertain to the prosecution upon which the act is based, and the absence of a pretrial hearing on the admissibility of this evidence, has kept many victims of sex crimes from testifying against their attackers, has obscured the facts in sexual assault cases to the extent that juries have often reached improper verdicts, and has greatly hampered the administration of criminal justice in Arkansas. Therefore, an emergency is hereby declared to exist, and this Act being necessary for the preservation of the public peace, health, and safety shall take effect and be in force from the date of its approval."

Acts 1985, No. 444, § 3: Mar. 20, 1985. Emergency clause provided: "It is hereby found and determined by the General Assembly that young children who have been victims of sexual crimes suffer tremendous physical and mental trauma. Such trauma is compounded when the child must recount the crime in open court in unfamiliar surroundings. The General Assembly hereby finds that currently there is no provision in Arkansas law that authorizes the victim's parents or legal guardian be present in court during the examination and cross-examination of the child during the trial. Therefore, current law inadequately protects the mental well-being of the minors in this State and this Act is necessary to correct this problem. Therefore, an emergency is hereby declared to exist and this Act, being necessary for the immediate preservation of the public peace, health and safety, shall be in full force and effect from and after its passage and approval."

16-42-101. Admissibility of evidence of victim's prior sexual conduct.

(a) As used in this section, unless the context otherwise requires, "sexual conduct" means deviate sexual activity, sexual contact, or sexual intercourse, as those terms are defined by § 5-14-101.

(b) In any criminal prosecution under § 5-14-101 et seq. or § 5-26-202, or for criminal attempt to commit, criminal solicitation to commit, or criminal conspiracy to commit an offense defined in any of those sections, opinion evidence, reputation evidence, or evidence of specific instances of the victim's prior sexual conduct with the defendant or any other person, evidence of a victim's prior allegations of sexual conduct with the defendant or any other person, which allegations the victim asserts to be true, or evidence offered by the defendant concerning prior allegations of sexual conduct by the victim with the defendant or any other person if the victim denies making the allegations is not admis-

sible by the defendant, either through direct examination of any defense witness or through cross-examination of the victim or other prosecution witness, to attack the credibility of the victim, to prove consent or any other defense, or for any other purpose.

(c) Notwithstanding the prohibition contained in subsection (b) of this section, evidence directly pertaining to the act upon which the prosecution is based or evidence of the victim's prior sexual conduct with the defendant or any other person may be admitted at the trial if the relevancy of the evidence is determined in the following manner:

(1) A written motion shall be filed by the defendant with the court at any time prior to the time the defense rests stating that the defendant has an offer of relevant evidence prohibited by subsection (b) of this section and the purpose for which the evidence is believed relevant;

(2)(A) A hearing on the motion shall be held in camera no later than three (3) days before the trial is scheduled to begin, or at such later time as the court may for good cause permit.

(B) A written record shall be made of the in camera hearing and shall be furnished to the Arkansas Supreme Court on appeal.

(C) If, following the hearing, the court determines that the offered proof is relevant to a fact in issue, and that its probative value outweighs its inflammatory or prejudicial nature, the court shall make a written order stating what evidence, if any, may be introduced by the defendant and the nature of the questions to be permitted in accordance with the applicable rules of evidence; and

(3)(A) If the court determines that some or all of the offered proof is relevant to a fact in issue, the victim shall be told of the court's order and given the opportunity to consult in private with the prosecuting attorney.

(B) If the prosecuting attorney is satisfied that the order substantially prejudices the prosecution of the case, an interlocutory appeal on behalf of the state may be taken in accordance with Rule 36.10 (a) and (c), Arkansas Rules of Criminal Procedure.

(C) Further proceedings in the trial court shall be stayed pending determination of the appeal. However, a decision by the Arkansas Supreme Court sustaining in its entirety the order appealed shall not bar further proceedings against the defendant on the charge.

(d) In the event the defendant has not filed a written motion or a written motion has been filed and the court has determined that the offered proof is not relevant to a fact in issue, any willful attempt by counsel or a defendant to make any reference to the evidence prohibited by subsection (b) of this section in the presence of the jury may subject counsel or a defendant to appropriate sanctions by the court.

History. Acts 1977, No. 197, §§ 1-4; 1983, No. 889, § 1; A.S.A. 1947, §§ 41-1810.1 — 41-1810.4; Acts 1993, No. 934, §§ 1-3; 1997, No. 970, § 1.

Amendments. The 1993 amendment inserted "evidence of a victim's prior alle-

gations of sexual conduct ... if the victim denies making the allegations" in (b); substituted "prohibited by subsection (b) of this section" for "of the victim's prior sexual conduct" in (c)(1); and substituted "evidence prohibited by subsection (b) of this

section" for "victim's prior sexual conduct" in (d).

The 1997 amendment substituted "§ 5-

14-101 et seq. or § 5-26-202" for "§§ 5-14-103 — 5-14-110" in (b).

RESEARCH REFERENCES

Ark. L. Rev. Cochran, Legislative Note: Act 197 of 1977: Arkansas' Rape-Shield Statute, 32 Ark. L. Rev. 806.

Recent Developments: Criminal Law — Evidence: What Constitutes Relevant Evidence in Rape Trial When Defense is Consent, 32 Ark. L. Rev. 826.

Recent Developments (State v. Babbs), 51 Ark. L. Rev. 647.

UALR L.J. Survey of Arkansas Law, Evidence, 1 UALR L. J. 191.

Legislative Survey, Criminal Law, 4 UALR L.J. 583.

Legislative Survey, Evidence, 16 UALR L.J. 127.

CASE NOTES

ANALYSIS

Constitutionality.

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The exception to the general exclusionary policy and the in camera hearing, under this section, provide the accused with a full and fair opportunity to confront his accuser. *Marion v. State*, 267 Ark. 345, 590 S.W.2d 288 (1979).

This section does not deny the equal protection of the law, in that it restricts the defendant's freedom to introduce evidence with no similar restriction upon the prosecution, inasmuch as the prosecution is actually restricted by the principle that it cannot bolster its case by proving that the same defendant committed another rape, and since the classification made by this section is not arbitrary, being based upon permissible considerations of public

policy. *Dorn v. State*, 267 Ark. 365, 590 S.W.2d 297 (1979); *Burrow v. State*, 301 Ark. 222, 783 S.W.2d 52 (1990).

—Ineffective Assistance of Counsel.

Decision by defendant's attorney not to request a hearing under this section to explore the relevance of evidence of the victim's prior sexual conduct, may not, standing alone, be sufficient to establish ineffective assistance of counsel; however, when considered together with counsel's failure to call a witness who would have testified that the eleven-year-old victim had told her that she had fabricated the allegations, the court properly concluded that attorney's conduct fell below an objective standard of competence. *Wicoff v. State*, 321 Ark. 97, 900 S.W.2d 187 (1995).

In General.

This section prohibits evidence of the victim's prior sexual conduct unless, on written motion and hearing, relevancy of the proffered evidence is established and its probative value outweighs its prejudicial effect. *Terrell v. State*, 26 Ark. App. 8, 759 S.W.2d 46 (1988).

This section broadly excludes evidence of specific instance of the victim's sexual conduct prior to the trial. *Laughlin v. State*, 316 Ark. 489, 872 S.W.2d 848 (1994).

Construction.

This section relates only to proof of the victim's prior "sexual conduct," as defined in this section, and posing in the nude for a photograph does not fall within that definition of sexual conduct. *Bobo v. State*, 267 Ark. 1, 589 S.W.2d 5 (1979).

The "prior" acts mentioned in this section do not refer to sexual acts occurring before the incident in question, but merely any sexual conduct by the victim. *Flurry v. State*, 290 Ark. 417, 720 S.W.2d 699 (1986).

This section excludes evidence of any kind about the victim's prior "sexual conduct" and defines "sexual conduct" as deviate sexual activity, sexual contact, or sexual intercourse. *West v. State*, 290 Ark. 329, 722 S.W.2d 284 (1987).

"Prior" sexual conduct includes all sexual behavior of the victim prior to the date of the trial. *Slater v. State*, 310 Ark. 73, 832 S.W.2d 846 (1992).

Purpose.

Information regarding the sexual history of a victim is usually totally irrelevant to the charge of rape and this section was obviously designed to limit this type of examination and protect the victim from unnecessary humiliation. *Duncan v. State*, 263 Ark. 242, 565 S.W.2d 1 (1978).

The primary purposes of this section were to protect the victim and encourage rape victims to participate in the prosecution of their attackers. *Brewer v. State*, 269 Ark. 185, 599 S.W.2d 141 (1980).

This section is intended to shield victims of rape or sexual abuse from the humiliation of having their personal conduct, unrelated to the charges, paraded before the jury and the public, when such conduct is irrelevant to the defendant's guilt. *Flurry v. State*, 290 Ark. 417, 720 S.W.2d 699 (1986); *Gaines v. State*, 313 Ark. 561, 855 S.W.2d 956 (1993).

The purpose of this section is to limit evidence of the victim's past sexual conduct and to protect the victim from unnecessary humiliation. *Terrell v. State*, 26 Ark. App. 8, 759 S.W.2d 46 (1988).

The purposes of this section is to protect the victim and encourage rape victims to participate in the prosecution of their attackers, and such purposes would be thwarted if defendants were allowed to present uncorroborated evidence that there had been prior consensual acts over the victim's denial that she had ever known her assailant before the incident. *Graydon v. State*, 329 Ark. 596, 953 S.W.2d 45 (1997).

Applicability.

This section did not apply where prosecutor elicited from victim testimony that

she had been a virgin prior to the rape since this section relates to specific instances of the victim's prior sexual conduct while prosecutor's question did not relate the victim's prior sexual conduct but to the lack thereof. *Brewer v. State*, 269 Ark. 185, 599 S.W.2d 141 (1980).

This section is not a total bar to evidence of a victim's sexual conduct but instead makes its admissibility discretionary with the trial judge pursuant to the procedures set out at subdivisions (c)(1-3). *Gaines v. State*, 313 Ark. 561, 855 S.W.2d 956 (1993).

In order to set in motion a relevancy decision by the trial court regarding prior sexual conduct, subdivision (c)(1) of this section requires that the defendant file a written motion with the court before resting to the effect that the defendant desires to present evidence of the victim's past sexual activity. *Laughlin v. State*, 316 Ark. 489, 872 S.W.2d 848 (1994).

This section does not apply to a charge of violation of a minor. *Donihoo v. State*, 325 Ark. 483, 931 S.W.2d 69 (1996).

Subsection (b) of this section has no application to a prior inconsistent statement made by the victim as to the offense charged. *Lindsey v. State*, 54 Ark. App. 266, 925 S.W.2d 441 (1996).

Admissibility.

Evidence properly held inadmissible. *Duncan v. State*, 263 Ark. 242, 565 S.W.2d 1 (1978); *Houston v. State*, 266 Ark. 257, 582 S.W.2d 958 (1979); *Bobo v. State*, 267 Ark. 1, 589 S.W.2d 5 (1979); *Hubbard v. State*, 271 Ark. 937, 611 S.W.2d 526 (1981); *Boreck v. State*, 272 Ark. 240, 613 S.W.2d 96 (1981); *Manees v. State*, 274 Ark. 69, 622 S.W.2d 166 (1981); *Fields v. State*, 281 Ark. 43, 661 S.W.2d 359 (1983); *Lackey v. State*, 283 Ark. 150, 671 S.W.2d 757 (1984); *Jackson v. State*, 284 Ark. 478, 683 S.W.2d 606 (1985).

This section only excludes evidence of prior sexual conduct of the victim, and the defendant may testify at trial as to the actions of the prosecuting witness on the night of the alleged rape. *Kemp v. State*, 270 Ark. 835, 606 S.W.2d 573 (1980).

Evidence of prior consensual sexual conduct is inadmissible unless such prior sexual activities were with the accused, and, even in that event, the testimony is allowed only to show that consent may have been given since this section clearly

holds such evidence is inadmissible unless it meets certain tests outlined therein. *Eskew v. State*, 273 Ark. 490, 621 S.W.2d 220 (1981); *Gaines v. State*, 313 Ark. 561, 855 S.W.2d 956 (1993).

Acts of prior consensual intercourse with the accused are admissible only to show that consent may have been given, and where consent is not at issue, because the defendant denies that the act ever occurred, the prior sexual conduct of the prosecutrix is not relevant. *State v. Small*, 276 Ark. 26, 631 S.W.2d 616 (1982).

The trial court did not err when it refused to allow the defendant to testify that he was told by his codefendant that the codefendant had had prior sexual relations with the alleged rape victim, since the testimony was not coming directly from the codefendant and was, therefore, inadmissible hearsay evidence. *Watson v. State*, 277 Ark. 197, 640 S.W.2d 447 (1982).

The trial court did not abuse its discretion in not allowing questioning of the victim about her prior sexual conduct, even where the physician stated that he found nonmotile sperm in her vagina and that sperm could remain motile for up to five days. *Lackey v. State*, 288 Ark. 225, 703 S.W.2d 858 (1986).

This section, on its face, does not deal with matters that may have occurred subsequent to the alleged offense, and therefore it was error to grant the state's motion in limine to preclude the defendant from offering or cross examining on the basis of the taped telephone conversation between the victim and her step-mother that occurred several months after the alleged rape, which included some references to sexual conduct of the victim some time after the alleged rape. *Flurry v. State*, 18 Ark. App. 64, 711 S.W.2d 163 (1986).

While evidence of the victim's and defendant's past relationship should be admitted into evidence, evidence of explicit sexual conduct that has no direct bearing on the events which occurred at the time of the alleged rape should be excluded. *Terrell v. State*, 26 Ark. App. 8, 759 S.W.2d 46 (1988).

Trial court did not abuse its discretion in allowing question regarding how old bruises were without reference to victim's prior sexual conduct. *Harris v. State*, 322 Ark. 167, 907 S.W.2d 729 (1995).

Court's decision to exclude from the evidence victim's allegations against her step-grandfather was not clearly erroneous. *Samples v. State*, 50 Ark. App. 163, 902 S.W.2d 257 (1995).

The court properly excluded evidence that, four years before the incident at issue, the victim filed a rape charge against another person, but withdrew the charge one day after filing her report. *Booker v. State*, 334 Ark. 434, 976 S.W.2d 918 (1998).

—Expert Testimony.

Where physician's testimony in a rape case embraced the ultimate issue of forced sex, but did not mandate a legal conclusion because the testimony did not exclude other causes for the victim's injuries, it was not inadmissible opinion testimony on the ultimate issue. *Davlin v. State*, 320 Ark. 624, 899 S.W.2d 451 (1995).

—Impeachment of Non-Victim Witness.

Evidence of a sexual affair between the victim and a witness held inadmissible where defendant failed to show how evidence of the alleged sexual affair would impeach the witness' credibility. *Davlin v. State*, 320 Ark. 624, 899 S.W.2d 451 (1995).

Consent.

Acts of prior consensual conduct between the victim and the accused are admissible only when consent is at issue; where the victim is younger than the age of consent at the time of the alleged conduct, consent patently cannot be a defense. *Drymon v. State*, 316 Ark. 799, 875 S.W.2d 73 (1994).

Prior acts of sexual conduct are not within themselves evidence of consent in a subsequent sexual act, unless there is additional evidence connecting the prior acts to the consent alleged in the subsequent act. *Graydon v. State*, 329 Ark. 596, 953 S.W.2d 45 (1997).

The court properly ruled that the alleged victim's subsequent consensual sex with one of the defendants was relevant and probative on the consent issue to be raised at the trial of the defendants. *State v. Babbs*, 334 Ark. 105, 971 S.W.2d 774 (1998).

Cross-Examination.

The court correctly limited the scope of prosecutrix's cross-examination to allow

examination as to the two defendants while excluding testimony about her relations with others. *Bobo v. State*, 267 Ark. 1, 589 S.W.2d 5 (1979).

What the victim told her father at the time of the rape or what motivated her to cause the charges to be filed was not open to questioning. *Sterling v. State*, 267 Ark. 208, 590 S.W.2d 254 (1979).

Where defense counsel sought to cross-examine prosecutrix about how long it had been before the rape when she had last had intercourse, the court properly refused to allow such cross-examination since proof of that kind is broadly forbidden by this section and since no written motion to permit such proof was filed before the trial, nor was there a showing of good cause for the matter having been delayed until the trial was in progress. *Isom v. State*, 280 Ark. 131, 655 S.W.2d 405 (1983).

Disclosure of Defense.

An accused must reveal, upon the state's request, the nature of any defense which he intends to establish at trial, and the names and addresses of the witnesses who will testify in support of those defenses; therefore, at the in camera hearing, it appears that the accused is not forced to reveal any more of his defense strategy than he is required to do under existing procedural rules. *Marion v. State*, 267 Ark. 345, 590 S.W.2d 288 (1979).

Discretion of Court.

The appellate court could not decide whether the evidence of the victim's prior conduct was admissible where defendant failed to proffer what the evidence would have been. *Gaines v. State*, 313 Ark. 561, 855 S.W.2d 956 (1993).

The trial court is vested with a great deal of discretion in ruling whether prior sexual conduct of a prosecuting witness is relevant, and the appellate court does not overturn its decision unless it was clearly erroneous. *Gaines v. State*, 313 Ark. 561, 855 S.W.2d 956 (1993).

Under this section, the trial court, upon proper motion, may engage in a balancing test to assess whether the probative value of the testimony sought outweighs the inflammatory nature of the testimony. *Laughlin v. State*, 316 Ark. 489, 872 S.W.2d 848 (1994).

Hearing.

The in camera hearing is not designed to be used as a subterfuge to obtain a discovery deposition from the alleged victim, and there is no requirement that the victim present herself for questioning by the accused. *Sterling v. State*, 267 Ark. 208, 590 S.W.2d 254 (1979).

Subdivision (c)(2)(A) of this section clearly provides that a hearing shall be held on a motion; however, the timing of the hearing is not mandatory and may occur closer to the trial as the court permits "for good cause." *Drymon v. State*, 316 Ark. 799, 875 S.W.2d 73 (1994).

Interlocutory Appeal.

A ruling on whether testimony is hearsay is not subject to an interlocutory appeal under this section. *State v. Small*, 276 Ark. 26, 631 S.W.2d 616 (1982).

The rape-shield law is a product of the General Assembly, and until it sees fit to provide for interlocutory appeal by the state of a trial court's decision with respect to admitting evidence of prior false allegations made by an alleged victim, or until some other jurisdictional basis by rule or constitutional provision appears, the Supreme Court lacks jurisdiction to hear such an appeal. *State v. Mills*, 311 Ark. 363, 844 S.W.2d 324 (1992).

Motions by Defendant.

It is the defendant's responsibility to pursue a motion requesting a hearing and to bring the matter of a hearing to the court's attention. *Cupples v. State*, 318 Ark. 28, 883 S.W.2d 458 (1994).

Subdivision (c)(1) of this section requires a written motion to be filed; failure to do so waives the right to challenge application of this section on appeal. *Lindsey v. State*, 319 Ark. 132, 890 S.W.2d 584 (1994).

Evidence barred where defendant failed to file a motion as required by subdivision (c)(2)(C); arguments made in response to the State's motion in limine to bar the evidence were insufficient to comply with this section. *Mosley v. State*, 325 Ark. 469, 929 S.W.2d 693 (1996).

Where there was no showing that a motion to admit the evidence of the victim's prior sexual conduct was filed in writing, that the issue was timely raised, or that the trial court in any manner abused its discretion in not finding "good

cause" to hold a relevancy hearing later than three days before the trial, the defendant failed to comply with the requirements of subsection (c). *Bradley v. State*, 327 Ark. 6, 937 S.W.2d 628 (1997).

Objection Untimely.

Where record reflected the state had already asked and received answers to questions regarding witness's sexual relations with the defendant without objection, later objection to the same questioning was untimely, as failure to object at the first opportunity waives any right to raise the point on appeal. *Laymon v. State*, 306 Ark. 377, 814 S.W.2d 901 (1991).

Relevance.

Virginity is not relevant per se in a rape case. *Duncan v. State*, 263 Ark. 242, 565 S.W.2d 1 (1978).

Where the two defendants sought to show the prosecutrix's prior sexual relations with a third person both earlier on the same evening and in the same room as the alleged rape and at other times in the past, the court correctly allowed testimony about the incident of the same evening that occurred almost as part of the same episode, but that ruling did not establish the relevancy of any other sexual relations the third person may have had with her so as to render the court's order excluding evidence of his prior sexual relations with the prosecutrix erroneous. *Bobo v. State*, 267 Ark. 1, 589 S.W.2d 5 (1979).

Prior acts of sexual conduct are not within themselves evidence of consent in a subsequent sexual act; there must be some additional evidence connecting such prior acts to the alleged consent in the present case before the prior acts become relevant. *Sterling v. State*, 267 Ark. 208, 590 S.W.2d 254 (1979).

When a female at the very threshold of puberty maintains that her father has been having sexual intercourse with her on a regular basis, sometimes as often as two or three times a week since early childhood, the prosecution's medical evidence that the child demonstrates physical characteristics consistent with prolonged sexual activity has an unmistakable relevance to the factual issue, and is not made inadmissible by this section. *Marcus v. State*, 299 Ark. 30, 771 S.W.2d 250 (1989).

Evidence of victim's past homosexual activity, sought to be admitted to impeach victim who stated defendant was the only person to have committed such acts with victim, was properly held not legally relevant. *Logan v. Lockhart*, 994 F.2d 1324 (8th Cir. 1993), cert. denied, 510 U.S. 1057, 114 S. Ct. 722, 126 L. Ed. 2d 686 (1994); *Gaines v. State*, 313 Ark. 561, 855 S.W.2d 956 (1993).

Victim's prior sexual conduct with separate males did not bear on or relate to whether she consented to a group-sex situation. *State v. Sheard*, 315 Ark. 710, 870 S.W.2d 212 (1994).

Evidence that the victim had a black eye the day before the rape occurred held admissible, but testimony that the victim's husband struck her because she was having an extra-marital affair held inadmissible as hearsay and because, although minimally relevant, its prejudice substantially outweighed its probative value. *Davlin v. State*, 320 Ark. 624, 899 S.W.2d 451 (1995).

Sexual Conduct.

Partying, drinking, and flirting do not constitute sexual conduct under this section. *Slater v. State*, 310 Ark. 73, 832 S.W.2d 846 (1992).

Masturbation by the victim is not included within the definition of "sexual conduct" under subsection (a) of this section; however, incidents of individual masturbation by a victim have no relevance when the question at hand is whether a defendant raped that victim. *Drymon v. State*, 316 Ark. 799, 875 S.W.2d 73 (1994).

As in the case of prior sexual conduct excluded under this section, there is a definite humiliation and embarrassment to the victim associated with a line of inquiry into victim's masturbation history which is not warranted when the evidentiary value of the evidence is weak. *Drymon v. State*, 316 Ark. 799, 875 S.W.2d 73 (1994).

Cited: *Pruitt v. State*, 8 Ark. App. 350, 652 S.W.2d 51 (1983); *Johnson v. State*, 290 Ark. 166, 717 S.W.2d 805 (1986); *Logan v. State*, 300 Ark. 35, 776 S.W.2d 341 (1989); *Rorex v. State*, 31 Ark. App. 127, 790 S.W.2d 180 (1990); *Dillard v. State*, 313 Ark. 439, 855 S.W.2d 909 (1993); *Cooper v. State*, 317 Ark. 485, 879 S.W.2d 405 (1994); *Evans v. State*, 317 Ark. 532, 878 S.W.2d 750 (1994); *Byrum v. State*, 318

Ark. 87, 884 S.W.2d 248 (1994); Caldwell v. State, 319 Ark. 243, 891 S.W.2d 42 (1995).

16-42-102. Presence of parent or custodian at proceedings involving minor sexual assault victims.

In any prosecution for a sexual offense or inchoate offense to a sexual offense, upon motion of the prosecuting attorney and after notice to opposing counsel, the court may, for good cause shown, allow the presence of the parent, stepparent, guardian, custodian, or other person with custody of an alleged minor victim of a sexual offense or inchoate offense to a sexual offense during the examination and cross-examination of the minor at any hearing, deposition, or trial.

History. Acts 1985, No. 444, § 1; A.S.A. 1947, § 43-2038.

Cross References. Right of victim to be present at hearing, Evid. Rule 616.

CHAPTER 43 WITNESSES GENERALLY

SUBCHAPTER.

1. GENERAL PROVISIONS.
2. SECURING ATTENDANCE GENERALLY.
3. UNIFORM RENDITION OF PRISONERS AS WITNESSES IN CRIMINAL PROCEEDINGS ACT.
4. UNIFORM ACT TO SECURE THE ATTENDANCE OF WITNESSES FROM WITHOUT THE STATE IN CRIMINAL CASES.
5. COMPETENCY — CRIMINAL PROCEEDINGS.
6. IMMUNITY — CRIMINAL PROCEEDINGS.
7. EXAMINATION.
8. COMPENSATION.
9. PATERNITY OR CHILD SUPPORT.
10. MINORS.

SUBCHAPTER 1 — GENERAL PROVISIONS

SECTION.

- 16-43-101. Exemption of witnesses from summons when obeying subpoena.
- 16-43-102. Privilege from arrest while serving as witness.

SECTION.

- 16-43-103. Unlawful arrest — Abatement of suit — Fine.

RESEARCH REFERENCES

Ark. L. Rev. Witness Privileges, 15
Ark. L. Rev. 93.

16-43-101. Exemption of witnesses from summons when obeying subpoena.

A witness shall not be liable to be sued in a county in which he does

not reside by being served with a summons in that county while going, returning, or attending in obedience to a subpoena.

History. Civil Code, § 595; C. & M. Dig., § 4171; Pope's Dig., § 5181; A.S.A. 1947, § 28-521.

CASE NOTES

ANALYSIS

In general.
Illustrative cases.

In General.

A party cannot be lawfully served with civil process while he is in attendance on a court in a state other than that of his residence either as a party or a witness or while going thereto or returning therefrom. *Martin v. Bacon*, 76 Ark. 158, 88 S.W. 863 (1905).

Illustrative Cases.

A resident of the state, while attending the taking of depositions in a cause to which he is a party in a county not of his residence, is privileged from service of summons in another action there pending. *Powers v. Arkadelphia Lumber Co.*, 61 Ark. 504, 33 S.W. 842 (1896).

An attorney, while attending court in his professional capacity in a county other

than that of his residence, is not exempt from the service of summons in a civil action brought against him in that county. *Paul v. Stuckey*, 126 Ark. 389, 189 S.W. 676 (1916).

A member of the legislature may be served with summons in a civil action to appear at a future date after the legislature adjourns. *Doyle-Kidd Dry Goods Co. v. Munn*, 151 Ark. 629, 238 S.W. 40 (1922).

Where a nonresident was served with summons in the course of a trial while he was there as a witness under subpoena, he was immune from such service and the service would have to be quashed. *Frier v. Terry*, 230 Ark. 302, 323 S.W.2d 415 (1959).

Cited: *Caldwell v. Dodge*, 179 Ark. 235, 15 S.W.2d 318 (1929); *Terry v. Plunkett-Jarrell Grocery Co.*, 220 Ark. 3, 246 S.W.2d 415 (1952).

16-43-102. Privilege from arrest while serving as witness.

All witnesses shall be privileged from arrest in all cases except treason, felony, or breach of the peace during their attendance on any court where their attendance is required by subpoena, and going to and returning from the place where they may be required to appear to testify, allowing one (1) day for every twenty-five (25) miles from their residence.

History. Rev. Stat., ch. 158, § 10; C. & M. Dig., § 4159; Pope's Dig., § 5169; A.S.A. 1947, § 28-522.

CASE NOTES

Out-of-state Witnesses.

Subsection (c) of ARCP 45 does not provide for subpoena power over out-of-state witnesses testifying in a civil case. *McNees v. Mountain Home*, 993 F.2d 1359 (8th Cir. 1993).

Because ARCP 45 does not give the Chancery Court authority to compel an

out-of-state witness to appear to testify, a witness' appearance would be voluntary, and the witness would not be entitled to immunity from arrest under this section. *McNees v. Mountain Home*, 993 F.2d 1359 (8th Cir. 1993).

16-43-103. Unlawful arrest — Abatement of suit — Fine.

Any person who causes a witness to be arrested, knowing him to be in attendance as such upon a subpoena, shall have his suit abated and shall be fined at the discretion of the court from which the subpoena issued, in any sum not exceeding one hundred dollars (\$100).

History. Rev. Stat., ch. 158, § 11; C. & M. Dig., § 4160; Pope's Dig., § 5170; A.S.A. 1947, § 28-523.

SUBCHAPTER 2 — SECURING ATTENDANCE GENERALLY

SECTION.

- 16-43-201, 16-43-202. [Superseded.]
 16-43-203. Excusing of witness when deposition given.
 16-43-204. Attendance until discharged or case decided.
 16-43-205. Authorization for officials taking depositions to compel attendance of witnesses.
 16-43-206. Punishment for contempt.
 16-43-207. [Superseded.]
 16-43-208. Criminal proceedings — Subpoenas for witnesses generally.
 16-43-209. Criminal proceedings — Additional witnesses.

SECTION.

- 16-43-210. Criminal proceedings — Attendance by witness in several criminal cases.
 16-43-211. Criminal proceedings — Civil procedure to govern.
 16-43-212. Criminal proceedings — Issuance of subpoenas pursuant to investigations.
 16-43-213. Prisoner as witness — Attendance — Examination by deposition.
 16-43-214. Prisoner from Department of Correction as witness.

Publisher's Notes. Some provisions of this subchapter may be superseded by the ARCP pursuant to the Supersession Rule adopted by the Supreme Court of Arkansas in its order of December 18, 1978.

Cross References. Securing testimony of material witness in grand jury investigation, § 16-85-508.

Effective Dates. Acts 1845, § 3, p. 44: effective on passage.

Acts 1875, No. 77, § 53: effective on passage.

Acts 1937, No. 160, § 7: approved Mar. 1, 1937. Emergency clause provided: "It is found to be a fact that the less frequent meeting of the grand jury necessitates vesting authority in the prosecuting attorney to subpoena witnesses in order to properly prepare criminal cases. Therefore, this Act being necessary for the public health, peace, and safety, an emergency is hereby declared to exist, and this Act shall become effective immediately upon its passage."

RESEARCH REFERENCES

ALR. Sufficiency of efforts to procure witnesses' attendance to justify admission of his former testimony — state cases. 3 ALR 4th 87.

Am. Jur. 81 Am. Jur. 2d, Witn., § 1 et seq.

Ark. L. Rev. Witnesses, 27 Ark. L. Rev. 229.

C.J.S. 97 C.J.S., Witn., § 1 et seq.

16-43-201, 16-43-202. [Superseded.]

A.C.R.C. Notes. The Supreme Court of Arkansas stated in a Per Curiam of Nov. 24, 1986, that these sections, concerning subpoenas and compulsion of attendance of witnesses, were deemed superseded by the Arkansas Rules of Civil Procedure. The sections were derived from the following sources:

16-43-201. Acts 1973, No. 17, §§ 1-4; A.S.A. 1947, §§ 28-537—28-540.

16-43-202. Civil Code, § 609; C. & M. Dig., § 4208; Pope's Dig., § 5220; A.S.A. 1947, § 28-519.

16-43-203. Excusing of witness when deposition given.

A witness shall not be compelled to attend court for oral examination where his deposition may be used unless he has failed, when duly summoned, to appear and give his deposition.

History. Civil Code, § 608; C. & M. Dig., § 4207; Pope's Dig., § 5219; A.S.A. 1947, § 28-520.

16-43-204. Attendance until discharged or case decided.

Any person subpoenaed to appear before any court of record of this state, or justice of the peace, to give evidence in any case brought before the court or justice shall attend each and every term, or from time to time, until the case is decided, or until the witness is discharged by the court or justice trying the case.

History. Acts 1845, § 1, p. 44; C. & M. Dig., § 4172; Pope's Dig., § 5182; A.S.A. 1947, § 28-509.

Cross References. Continuance for absence of witness, § 16-63-402.

16-43-205. Authorization for officials taking depositions to compel attendance of witnesses.

Every person, judge, justice of the peace, or master in chancery in this state who is required to take depositions or examinations of witnesses in pursuance of this act, or by virtue of any commission issued out of any court of record of this or any other government, shall have power to issue subpoenas for witnesses to appear and testify and to compel their attendance in the same manner and under the same penalties as any court of record of this state.

History. Rev. Stat., ch. 48, § 14; C. & M. Dig., § 4154; Pope's Dig., § 5164; A.S.A. 1947, § 28-504.

the Revised Statutes, codified as §§ 16-43-205, 16-44-102 [superseded], 16-44-108 [superseded], 16-44-109 [superseded].

Meaning of "this act". Chapter 48 of

16-43-206. Punishment for contempt.

(a) Disobedience of a subpoena or a refusal to be sworn or to answer as a witness or to subscribe an affidavit or deposition when lawfully

ordered may be punished as a contempt of the court or officer by whom the attendance or testimony is required.

(b) The punishment for the contempt provided in subsection (a) of this section shall be by a fine not exceeding thirty dollars (\$30.00) and imprisonment not exceeding twenty-four (24) hours. But in case of the refusal of a witness to testify or be sworn or to give a deposition, he shall continue to be imprisoned so long as he refuses. If the court finally adjourns before he submits, he shall remain imprisoned until the next term. The final disposition of the case in which he so refuses shall discharge him from imprisonment.

(c) A witness imprisoned or fined by an officer before whom his deposition is being taken may apply to the circuit judge, who shall have power to discharge the witness if it appears that the imprisonment is illegal.

(d) Every warrant of commitment to prison issued by a court or an officer pursuant to this section must specify particularly the cause of commitment. Every warrant to arrest or commit a witness must be directed to the sheriff of the county where the witness may be located and must be executed in the same manner as process from the court.

History. Civil Code, §§ 587, 590-592; C. & M. Dig., §§ 4163, 4166-4168; Pope's Dig., §§ 5173, 5176-5178; A.S.A. 1947, §§ 28-512, 28-515 — 28-517.

A.C.R.C. Notes. The Supreme Court of Arkansas stated in a Per Curiam of Nov.

24, 1986, that subsections (a), (b), and (d) of this section were deemed superseded by the Arkansas Rules of Civil Procedure.

Cross References. Contempt generally, § 16-10-108.

16-43-207. [Superseded.]

A.C.R.C. Notes. The Supreme Court of Arkansas stated in a Per Curiam of Nov. 24, 1986, that this section, concerning disobedience of subpoenas, was deemed superseded by the Arkansas Rules of Civil

Procedure. The section was derived from Civil Code, §§ 588, 589; C. & M. Dig., §§ 4164, 4165; Pope's Dig., §§ 5174, 5175; A.S.A. 1947, §§ 28-513, 28-514.

16-43-208. Criminal proceedings — Subpoenas for witnesses generally.

(a) The clerk of the court, upon request of the prosecuting attorney or upon request of the defendant or his attorney, shall issue subpoenas for witnesses.

(b) The state shall have the right to subpoena at the expense of the county six (6) witnesses if the charge is a misdemeanor and twelve (12) witnesses if it is a felony less than a capital offense. The defendant shall have the right to subpoenas at the expense of the county for six (6) witnesses in misdemeanor and twelve (12) witnesses in felony cases less than capital. There shall be no limit upon the number of witnesses who may be subpoenaed at the expense of the county in capital cases.

(c) Either party shall have the right to recall subpoenas before service and substitute the names of other witnesses for those for whom subpoenas were originally issued.

(d) Neither side shall in any event have at the expense of the county more than six (6) character witnesses in any type of case, capital or otherwise.

History. Crim. Code, § 151; C. & M. Dig., § 3109; Init. Meas. 1936, No. 3, § 34, Acts 1937, p. 1384; Pope's Dig., § 3939; A.S.A. 1947, § 43-2001.

Cross References. County not to pay

for making more than two returns for subpoenas in any given case, § 21-6-504.

Right of accused to obtain witnesses by compulsory process, Ark. Const., Art. 2, § 10.

CASE NOTES

ANALYSIS

Capital cases.

Fees.

Service.

Capital Cases.

The right to subpoena unlimited witnesses in capital murder cases is not absolute when it pertains to out-of-state witnesses; thus, the court did not abuse its discretion in denying subpoenas for a federal prisoner incarcerated out-of-state and for various state prisoners where the defendant did not furnish any information which indicated that these witnesses were material to the defense and where the court specifically ruled on relevance. *Henry v. State*, 278 Ark. 478, 647 S.W.2d 419, cert. denied, 464 U.S. 835, 104 S. Ct. 121, 78 L. Ed. 2d 119 (1983).

This section, which provides for unlimited out-of-state witnesses in capital felony cases, must be read in conjunction with § 16-43-403, which provides that such witnesses must be material; such right to witnesses is not absolute but, rather, rests within the sound discretion of the trial judge. *Mackey v. State*, 279 Ark. 307, 651 S.W.2d 82 (1983).

In capital murder prosecution, trial court erred in refusing to subpoena out-of-state government witnesses who per-

formed certain tests which were negative or inconclusive in linking defendant to crime; however, error was harmless where other evidence available to jury indicated that test results were negative. *Mackey v. State*, 279 Ark. 307, 651 S.W.2d 82 (1983).

Fees.

Witnesses were entitled to fees whether used or not, or, if used, their testimony excluded as incompetent. *Peay v. Searcy County*, 111 Ark. 386, 163 S.W. 1147 (1914).

Service.

This section does not impose upon the sheriff a duty to serve subpoenas authorized by this section. *MacKintrush v. State*, 60 Ark. App. 42, 959 S.W.2d 404 (1997), aff'd, 334 Ark. 390, 978 S.W.2d 293 (1998).

The trial court properly dismissed a petition for mandamus to require the sheriff to serve a subpoena on a defense witness; the section is silent about the duty of the sheriff to serve subpoenas and there are other methods available for service. *MacKintrush v. State*, 334 Ark. 390, 978 S.W.2d 293 (1998).

Cited: *Perry v. State*, 277 Ark. 357, 642 S.W.2d 865 (1982); *Perry v. Lockhart*, 871 F.2d 1384 (8th Cir. 1989).

16-43-209. Criminal proceedings — Additional witnesses.

(a) Should either party desire additional witnesses at the expense of the county, he may file, in term time or in vacation of the court, his verified application for the additional witnesses with the judge of the court.

(b) The application shall contain a statement of the facts which the party expects to prove by each one of the additional witnesses sought and an affidavit that such facts cannot be adequately established by the witnesses for whom the party has had subpoenas issued. If any such

affidavit is willfully false, the party making it may be punished as for contempt of court. If the judge finds the application should be granted, he shall direct the clerk to issue subpoenas for the additional witnesses he finds the party should have.

(c) After the trial of the case or after the witnesses have testified, and not before, the judge shall file the application with the clerk of the court, and it shall become a part of the record in the case. In no event shall the judge disclose the contents of the application until the case has been tried or the witnesses have testified.

(d) While the trial is actually in progress, the court in its discretion may direct the clerk to issue additional subpoenas at the expense of the county without affidavits required by this subchapter.

(e) In any event, either party may have additional witnesses who receive no compensation from the county for their services.

History. Init. Meas. 1936, No. 3, § 35, Acts 1937, p. 1384; Pope's Dig., § 3940; A.S.A. 1947, § 43-2002.

CASE NOTES

Cited: Perry v. Lockhart, 871 F.2d 1384 (8th Cir. 1989).

16-43-210. Criminal proceedings — Attendance by witness in several criminal cases.

A witness subpoenaed to attend before any circuit court in more than one (1) criminal case at the same time or before a justice of the peace at the same time shall be allowed pay, when the costs are paid by the county, in only one (1) case and only for the actual number of days he is in attendance, regardless of the number of cases in which he is summoned or called upon to testify.

History. Acts 1875, No. 77, § 40, p. 167; C. & M. Dig., § 4612; Pope's Dig., § 5701; A.S.A. 1947, § 43-2003.

CASE NOTES

Cited: Perry v. Lockhart, 871 F.2d 1384 (8th Cir. 1989).

16-43-211. Criminal proceedings — Civil procedure to govern.

The provisions of the Code of Practice in Civil Cases shall apply to and govern summoning and coercing the attendance of witnesses and compelling them to testify in all prosecutions and all criminal or penal actions or proceedings, except that the attendance of witnesses residing in any part of the state may be coerced, and it shall never be necessary to tender to the witnesses any compensation for expenses or otherwise before process of contempt shall issue.

History. Crim. Code, § 152; Acts 1871, No. 49, § 1 [152], p. 255; C. & M. Dig., § 3110; Pope's Dig., § 3941; A.S.A. 1947, § 43-2004.

Publisher's Notes. The "Code of Practice in Civil Cases," referred to in this section, means the Code of Practice in Civil Cases of 1869. See parallel reference table in the tables volume.

CASE NOTES

ANALYSIS

Power of prosecuting attorney.
Pretrial deposition.

Power of Prosecuting Attorney.

At most, this section merely gives the prosecuting attorney the power to coerce the attendance of witnesses at a hearing and force them to testify "in all prosecutions," and does not give him the power to deny the presence of an attorney requested by a witness. *Gill v. State ex rel. Mobley*, 242 Ark. 797, 416 S.W.2d 269 (1967).

Pretrial Deposition.

Subpoena duces tecum directing corporate official to appear at pretrial deposition

with all records relating to work and pay records of co-workers involved in dispute was properly quashed despite defendant's claim that the information was relevant to his defense, since the issue of discrimination by the employer was irrelevant to dispute and, moreover, there was no statutory authority for the taking of a pretrial deposition in such circumstances. *Kelley v. State*, 7 Ark. App. 130, 644 S.W.2d 638 (1983).

Cited: *Copeland v. State*, 226 Ark. 198, 289 S.W.2d 524 (1956); *Williams v. State*, 237 Ark. 569, 375 S.W.2d 375 (1964); *Dickerson v. State*, 546 S.W.2d 712 (1977); *Spears v. State*, 264 Ark. 83, 568 S.W.2d 492 (1978).

16-43-212. Criminal proceedings — Issuance of subpoenas pursuant to investigations.

(a) The prosecuting attorneys and their deputies may issue subpoenas in all criminal matters they are investigating and may administer oaths for the purpose of taking the testimony of witnesses subpoenaed before them. Such oath when administered by the prosecuting attorney or his deputy shall have the same effect as if administered by the foreman of the grand jury. The subpoena shall be substantially in the following form:

"The State of Arkansas to the Sheriff of County: You are commanded to summon to attend before the Prosecuting Attorney at on the, A. D. 19, at ... M., and testify in the matter of an investigation then to be conducted by the said Prosecuting Attorney growing out of a representation that has committed the crime of in said County. Witness my hand this A. D. 19

.....
Prosecuting Attorney
By
Deputy Prosecuting Attorney"

(b) The subpoena provided for in subsection (a) of this section shall be served in the manner as provided by law and shall be returned, and a record made and kept, as provided by law for grand jury subpoenas. The fees and mileage of officers serving the subpoenas and of witnesses

in appearances in answer to the subpoenas shall be the same, and shall be paid in the same manner, as provided by law for grand jury witnesses.

(c) The failure of any officer to serve the subpoena or of a witness to appear on the returned date thereof shall constitute a misdemeanor and be punishable by fine of not less than ten dollars (\$10.00) nor more than one hundred dollars (\$100) or by imprisonment in the county jail not to exceed six (6) months, or by both such fine and imprisonment.

History. Acts 1937, No. 160, §§ 1-3; Pope's Dig., §§ 3793-3795; A.S.A. 1947, §§ 43-801 — 43-803.

RESEARCH REFERENCES

Ark. L. Rev. Hall, The Prosecutor's Subpoena Power, 33 Ark. L. Rev. 122.

CASE NOTES

ANALYSIS

Constitutionality.
Authority of prosecutor.
Defense witnesses.
Federal court abstention.
Right to counsel.
Specificity of subpoena.
Statement under oath.
Waiver of irregularities.

Constitutionality.

The court rejected defendant's argument that he was denied due process when he was not allowed equal discovery rights to those given the state pursuant to this section. *Wardius v. Oregon*, 412 U.S. 470, 93 S. Ct. 2208, 37 L. Ed. 2d 82 (1973) does not suggest that the due process clause requires states to adopt discovery procedures in criminal cases, but rather it held that, where a state imposes discovery against a defendant, equivalent rights must be given to a defendant. *Alford v. State*, 291 Ark. 243, 724 S.W.2d 151 (1987).

Authority of Prosecutor.

A prosecuting attorney may not, under guise of an investigation of possible vote buying, subpoena the bank records of a political party's checking account and thereby ascertain the identity of all contributors to the party's campaign and the amounts of their contributions without a showing that such information is reasonably relevant to such investigation or that

public interest in the disclosure of such information is sufficiently cogent and compelling to outweigh the legitimate and constitutionally protected interests of the party and its contributors in having that information remain private. *Pollard v. Roberts*, 283 F. Supp. 248 (E.D. Ark. 1968), *aff'd*, 393 U.S. 14, 89 S. Ct. 47, 21 L. Ed. 2d 14 (1968).

The authority of the prosecuting attorney to subpoena witnesses for investigative purposes is limited to subpoenaing those witnesses to appear at a place in the county where the alleged offenses or matters to be investigated occurred. *State ex rel. Streett v. Stell*, 254 Ark. 656, 495 S.W.2d 846 (1973).

Use of the prosecutor's subpoena power to obtain the presence of a witness for questioning by a police officer, absent the prosecutor, was illegal. *Duckett v. State*, 268 Ark. 687, 600 S.W.2d 18 (Ct. App. 1980).

A prosecuting attorney who issues a subpoena pursuant to this section takes the place of a grand jury. *Kaylor v. Fields*, 661 F.2d 1177 (8th Cir. 1981).

While subpoenas may be used under this section to bring in witnesses to interrogate them about a case under investigation as well as to review their testimony before trial but after the case has been investigated, it was an abuse of the prosecutor's subpoena power to assemble all of the state's witnesses in the trial court-

room prior to trial and question them under oath and in the presence of each other regarding the crime, without the knowledge of the trial judge or defense attorney, since this procedure without cross-examination could pressure recalcitrant witnesses to conform their testimony with the others. *Cook v. State*, 274 Ark. 244, 623 S.W.2d 820 (1981).

In the absence of an abuse of the power, a prosecutor's subpoena may be used to prepare for trial after charges have been filed. *Todd v. State*, 283 Ark. 492, 678 S.W.2d 345 (1984).

Where, without a subpoena, police officers picked up the defendant ostensibly because the prosecutor wished to see her, but the prosecutor did not participate in the subsequent questioning, the defendant's subsequent statement should have been suppressed. *Foster v. State*, 285 Ark. 363, 687 S.W.2d 829 (1985), cert. denied, 482 U.S. 929, 107 S. Ct. 3213, 96 L. Ed. 2d 700 (1987).

A prosecutor's power to subpoena must be used only for the prosecutor's investigation; the prosecutor abused his power to subpoena when he commanded that records be produced for the police. *State v. Hamzy*, 288 Ark. 561, 709 S.W.2d 397 (1986).

Prosecutor's use of his subpoena power to subpoena three witnesses who did not testify at trial, and to subpoena defendant's school records, was for investigation and preparation and did not amount to an abuse of the power. *Echols v. State*, 326 Ark. 917, 936 S.W.2d 509 (1996), cert. denied, 520 U.S. 1244, 117 S. Ct. 1853, 137 L. Ed. 2d 1055 (1997).

Defense Witnesses.

Subpoena of defense witnesses several months after the charges were filed and only one month prior to the original trial date was not an abuse of the prosecutor's

subpoena power. *Neal v. State*, 320 Ark. 489, 898 S.W.2d 440 (1995).

Federal Court Abstention.

The federal courts should abstain in a suit filed by a subpoena recipient who alleges that the prosecuting attorney subpoenaed papers and documents without probable cause. *Kaylor v. Fields*, 661 F.2d 1177 (8th Cir. 1981).

Right to Counsel.

Witnesses required to testify before the prosecuting attorney under this section are entitled to have their attorneys present. *Gill v. State ex rel. Mobley*, 242 Ark. 797, 416 S.W.2d 269 (1967).

Specificity of Subpoena.

A prosecuting attorney's subpoena issued under this section requiring a bank to produce records pertaining to the bank account of one of its depositors was not objectionable because it failed to specify the crime committed or the name of the person charged with committing it. *First Nat'l Bank v. Roberts*, 242 Ark. 912, 416 S.W.2d 316 (1967).

Statement Under Oath.

Prior inconsistent statement by witness given under oath to the deputy prosecuting attorney was properly admitted for its substantive content and a limiting instruction was not required since it was given to the prosecuting attorney as provided for in this section. *Slavens v. State*, 1 Ark. App. 245, 614 S.W.2d 529 (1981).

Waiver of Irregularities.

Defendant waived any irregularity in filing of information with the clerk instead of in open court, when he entered a plea of not guilty, as defendant was then in court. *Ogles v. State*, 214 Ark. 581, 217 S.W.2d 259 (1949).

Cited: *Kiefer v. State*, 297 Ark. 464, 762 S.W.2d 800 (1989); *In re Badami*, 309 Ark. 511, 831 S.W.2d 905 (1992).

16-43-213. Prisoner as witness — Attendance — Examination by deposition.

A person confined in any prison in this state for any cause other than a sentence for felony may, by order of the court, be required to be produced for oral examination in the county where he is imprisoned. However, in all other cases his examination must be taken by deposition.

History. Civil Code, § 593; C. & M. Dig., § 4169; Pope's Dig., § 5179; A.S.A. 1947, § 28-518.

CASE NOTES

ANALYSIS

Contempt.
Felon.

Contempt.

Although a convict may be compelled to testify under this section, he cannot, upon refusal to testify, be punished for contempt and his sentence in the penitentiary suspended during his sentence for

contempt. *Williams v. State*, 125 Ark. 287, 188 S.W. 826 (1916).

Felon.

Where a witness is a convicted felon and incarcerated in the state penitentiary, it is not error, in a criminal trial, for the court to overrule a motion by the defendant requesting that the attendance of the witness upon the trial be procured. *Tiner v. State*, 110 Ark. 251, 161 S.W. 195 (1913).

16-43-214. Prisoner from Department of Correction as witness.

(a) Upon presentation by the prosecuting attorney or interested defense counsel of a petition duly verified and for good cause, any circuit court having jurisdiction of any criminal offense involving a felony pending for trial in that court may have jurisdiction and authority to provide by proper order for the presence in court, and for the trial and as a witness, of any person incarcerated in the Department of Correction whose testimony would be material either for the State of Arkansas or for the defendant in the action.

(b) Upon the granting of a petition by the circuit court pursuant to subsection (a) of this section and upon presentation to the authorized officials of the Department of Correction of a signed order or certified copy thereof by the circuit clerk of such court, the officials having custody of the prisoner are authorized and directed to transport or cause to be transported the prisoner by such means and methods as they deem proper, at the time and place as directed by the order of the circuit court.

(c) The custody of a prisoner sought to be used as a witness shall at all times remain in the authorized officials of the Department of Correction, subject to the order and direction of the circuit court. Immediately upon the completion of the testimony by the prisoner in court or upon the completion of the trial requiring his presence, the prisoner shall be immediately returned to the Department of Correction by the official having his custody.

History. Acts 1959, No. 162, §§ 1-3; A.S.A. 1947, §§ 43-2022 — 43-2024.

RESEARCH REFERENCES

Ark. L. Rev. Witness Privileges, 15
Ark. L. Rev. 93.

CASE NOTES

Failure to Obtain Order.

Where no order was ever obtained under this section, trial court did not err in denying continuance requested because of absence of imprisoned witness. *Walker v.*

State, 280 Ark. 17, 655 S.W.2d 370 (1983); *Johnson v. State*, 287 Ark. 426, 700 S.W.2d 786 (1985).

Cited: *Walker v. Lockhart*, 807 F.2d 136 (8th Cir. 1986).

SUBCHAPTER 3 — UNIFORM RENDITION OF PRISONERS AS WITNESSES IN CRIMINAL PROCEEDINGS ACT

SECTION.

- 16-43-301. Interstate rendition of prisoners as witnesses — Definitions.
- 16-43-302. Hearing or request for presence of prisoner in another state.
- 16-43-303. Finding of court — Order that prisoner be produced in other state.
- 16-43-304. Contents of order — Safeguarding custody — Payment of expenses.
- 16-43-305. Insane or mentally ill persons not subject to subchapter.

SECTION.

- 16-43-306. Certificate for obtaining prisoner from another state to testify in this state.
- 16-43-307. Order for compliance with terms prescribed by court of other state.
- 16-43-308. Prisoner from other state immune from arrest or process while being transported or held as witness.
- 16-43-309. Uniformity of construction.
- 16-43-310. Short title.
- 16-43-311. Severability.
- 16-43-312. [Reserved.]

16-43-301. Interstate rendition of prisoners as witnesses — Definitions.

As used in this subchapter:

(1) "Witness" means a person who is confined in a penal institution in any state and whose testimony is desired in another state in any criminal proceeding or investigation by a grand jury or in any criminal action before a court;

(2) "Penal institutions" includes a jail, prison, penitentiary, house of correction, or other place of penal detention;

(3) "State" includes any state of the United States, the District of Columbia, the Commonwealth of Puerto Rico, and any territory of the United States.

History. Acts 1959, No. 216, § 1;
A.S.A. 1947, § 43-2025.

16-43-302. Hearing or request for presence of prisoner in another state.

A judge of a state court of record in another state, which by its laws has made provision for commanding persons confined in penal institutions within that state to attend and testify in this state, may certify:

(1) That there is a criminal proceeding or investigation by a grand jury or a criminal action pending in the court;

(2) That a person who is confined in a penal institution in this state may be a material witness in the proceeding, investigation, or action; and

(3) That his presence will be required during a specified time. Upon presentation of the certificate to any judge having jurisdiction over the person confined, and upon notice to the Attorney General, the judge in this state shall fix a time and place for a hearing and shall make an order directed to the person having custody of the prisoner requiring that the prisoner be produced before him at the hearing.

History. Acts 1959, No. 216, § 2;
A.S.A. 1947, § 43-2026.

16-43-303. Finding of court — Order that prisoner be produced in other state.

If at the hearing the judge determines:

(1) That the witness may be material and necessary;

(2) That his attending and testifying are not adverse to the interests of this state or to the health or legal rights of the witness;

(3) That the laws of the state in which he is requested to testify will give him protection from arrest and the service of civil and criminal process because of any act committed prior to his arrival in the state under the order; and

(4) That as a practical matter the possibility is negligible that the witness may be subject to arrest or to the service of civil or criminal process in any state through which he will be required to pass, the judge shall issue an order, with a copy of the certificate attached:

(A) Directing the witness to attend and testify;

(B) Directing the person having the custody of the witness to produce him, in the court where the criminal action is pending or where the grand jury investigation is pending, at a time and place specified in the order; and

(C) Prescribing such conditions as the judge shall determine.

History. Acts 1959, No. 216, § 3;
A.S.A. 1947, § 43-2027.

16-43-304. Contents of order — Safeguarding custody — Payment of expenses.

The order to the witness and to the person having custody of the witness shall provide for the return of the witness at the conclusion of his testimony, proper safeguards on his custody, and proper financial reimbursement or prepayment by the requesting jurisdiction for all expenses incurred in the production and return of the witness, and may prescribe such other conditions as the judge thinks proper or necessary. The order shall not become effective until the judge of the state requesting the witness enters an order directing compliance with the conditions prescribed.

History. Acts 1959, No. 216, § 4;
A.S.A. 1947, § 43-2028.

16-43-305. Insane or mentally ill persons not subject to subchapter.

This subchapter does not apply to any person in this state confined as insane or mentally ill.

History. Acts 1959, No. 216, § 5;
A.S.A. 1947, § 43-2029.

16-43-306. Certificate for obtaining prisoner from another state to testify in this state.

If a person confined in a penal institution in any other state may be a material witness in a criminal action pending in a court of record or in a grand jury investigation in this state, a judge of the court may certify:

(1) That there is a criminal proceeding or investigation by a grand jury or a criminal action pending in the court;

(2) That a person who is confined in a penal institution in the other state may be a material witness in the proceeding, investigation, or action; and

(3) That his presence will be required during a specified time. The certificate shall be presented to a judge of a court of record in the other state having jurisdiction over the prisoner confined, and a notice shall be given to the Attorney General of the state in which the prisoner is confined.

History. Acts 1959, No. 216, § 6;
A.S.A. 1947, § 43-2030.

16-43-307. Order for compliance with terms prescribed by court of other state.

The judge of the court in this state may enter an order directing compliance with the terms and conditions prescribed by the judge of the state in which the witness is confined.

History. Acts 1959, No. 216, § 7;
A.S.A. 1947, § 43-2031.

16-43-308. Prisoner from other state immune from arrest or process while being transported or held as witness.

If a witness from another state comes into or passes through this state under an order directing him to attend and testify in this or another state, he shall not while in this state pursuant to the order be subject to arrest or the service of process, civil or criminal, because of any act committed prior to his arrival in this state under the order.

History. Acts 1959, No. 216, § 8;
A.S.A. 1947, § 43-2032.

16-43-309. Uniformity of construction.

This subchapter shall be so construed as to effectuate its general purpose to make uniform the law of those states which enact it.

History. Acts 1959, No. 216, § 9;
A.S.A. 1947, § 43-2033.

16-43-310. Short title.

This subchapter may be cited as the “Uniform Rendition of Prisoners as Witnesses in Criminal Proceedings Act”.

History. Acts 1959, No. 216, § 10;
A.S.A. 1947, § 43-2034.

16-43-311. Severability.

If any provision of this subchapter or the application thereof to any person or circumstance is held invalid, the invalidity shall not affect other provisions or applications of the subchapter which can be given effect without the invalid provision or application, and to this end the provisions of this subchapter are severable.

History. Acts 1959, No. 216, § 11;
A.S.A. 1947, § 43-2034n.

16-43-312. [Reserved.]

Publisher’s Notes. Section 12 of the ULA act, the effective date provision, was not adopted in Arkansas.

**SUBCHAPTER 4 — UNIFORM ACT TO SECURE THE
ATTENDANCE OF WITNESSES FROM WITHOUT THE
STATE IN CRIMINAL CASES**

- SECTION.
16-43-401. [Reserved.]
16-43-402. Attendance in another state.
16-43-403. Witness from another state.
16-43-404. Witnesses immune from arrest.

- SECTION.
16-43-405. Uniformity of interpretation.
16-43-406. Short title — Uniform Act.
16-43-407. Repealer.
16-43-408. [Reserved.]
16-43-409. Effective date.

Preambles. Acts 1953, No. 352 contained a preamble which read: “Whereas, Act. No. 65 of the General Assembly of 1935 makes provision for the attendance of witnesses in criminal cases in this State under certain circumstances where the

witness resides in another state, and also makes provisions for payment of these witnesses in advance of the sum of ten cents per mile to and from the court and \$5.00 per day for their attendance; and
“Whereas, the same Act does not ex-

pressly provide for the method of payment of the aforesaid sums in advance; and

"Whereas, there has been some confusion in some of the judicial circuits of the State as to the correct manner of handling these payments in advance and handling the taxing of costs in the case; and

"Whereas, the General Assembly always intended the following procedure;

"Now, therefore..."

Publisher's Notes. For Comments regarding the Uniform Act to secure the Attendance of Witnesses from Without the State in Criminal Cases, see Commentaries Volume B.

Effective Dates. Acts 1953, No. 352, § 2: Mar. 28, 1953. Emergency clause provided: "The purpose of this Act is to declare and clarify the legislative intent in Act 65 of 1935 and is designed to make uniform the procedures to be followed under such Act is immediately necessary for the administration of justice in this State. Therefore, an emergency is hereby declared to exist and this Act being necessary for the immediate preservation of the public peace, health and safety shall be in full force and effect from and after its passage and approval."

Acts 1977, No. 453, § 5: approved Mar. 17, 1977. Emergency clause provided: "In 1935, the General Assembly passed Act 65

of 1935 which was Arkansas' version of the Uniform Act to Secure the Attendance of Witnesses from Without a State in Criminal Cases. The Arkansas version of the Uniform Act omitted references to grand jury and special criminal proceedings. Arkansas never adopted the new Uniform Act which was amended to correct this deficiency.

"It is hereby found by the General Assembly of the State of Arkansas that there is presently no way a person can be compelled to attend a grand jury proceeding in another state unless the Arkansas Uniform Act so provides. Likewise, persons from other states cannot be compelled to attend before an Arkansas grand jury unless the version of the Uniform Act in both states so provides.

"It is further found by the General Assembly of the State of Arkansas that there has been a tremendous growth of interstate crime. Most of these crimes are not within the United States Code, and the states must cooperate to prosecute them.

"Therefore, this Act being necessary for the efficient and adequate administration of criminal justice in the State, an emergency is hereby declared to exist, and this Act shall be effective and in force from and after its passage."

RESEARCH REFERENCES

ALR. Availability under Uniform Act to Secure the Attendance of Witnesses from Without a State in Criminal Proceedings of subpoena duces tecum. 7 ALR 4th 836.

Witness certificate to secure attendance of out-of-state witness under Uniform Act to Secure the Attendance of Witnesses from Without State in Criminal Proceedings. 12 ALR 4th 742.

Issuance of summons directing attendance of witness under Uniform Act to Secure the Attendance of Witnesses from Without a State in Criminal Proceedings. 12 ALR 4th 771.

Ark. L. Rev. Hall, The Prosecutor's Subpoena Power, 33 Ark. L. Rev. 122.

CASE NOTES

Cited: Thomas v. Pacheco, 293 Ark. 564, 740 S.W.2d 123 (1987).

16-43-401. [Reserved.]

Publisher's Notes. Section 1 of the ULA act, which concerns definitions, was not adopted in Arkansas.

16-43-402. Attendance in another state.

If a judge of a court of record in any state which by its laws has made provision for commanding persons within that state to attend and testify in this state certifies under the seal of such court that there is a criminal prosecution or criminal proceeding pending in such court, or that a grand jury or prosecuting attorney's investigation has commenced or is about to commence, that a person being within this state is a material witness in such prosecution or proceeding or grand jury or prosecuting attorney's investigation, and that his presence will be required for a specified number of days, and upon presentation of such certificate to any judge of a court of record in the county in which such person is, such judge shall fix a time and place for a hearing, and shall make an order directing the witness to appear at a time and place certain for the hearing.

If at a hearing the judge determines that the witness is material and necessary, that it will not cause undue hardship to the witness to be compelled to attend and testify in the prosecution or proceeding or a grand jury or prosecuting attorney's investigation in the other state, and that the laws of the state in which the prosecution or proceeding is pending, or grand jury or prosecuting attorney's investigation has commenced or is about to commence, and of any other state through which the witness may be required to pass by ordinary course of travel will give to him protection from arrest and the service of civil and criminal process, he shall issue a summons, with a copy of the certificate attached, directing the witness to attend and testify in the court where the prosecution or proceeding is pending, or where a grand jury or prosecuting attorney's investigation has commenced or is about to commence at a time and place specified in the summons. In any such hearing the certificate shall be prima facie evidence of all the facts stated therein.

If the certificate recommends that the witness be taken into immediate custody and delivered to an officer of the requesting state to assure his attendance in the requesting state, such judge may, in lieu of notification of the hearing, direct that such witness be forthwith brought before him for the hearing; and the judge at the hearing being satisfied of the desirability of such custody and delivery, for which determination the certificate shall be prima facie proof of such desirability may, in lieu of issuing subpoena or summons, order that the witness be forthwith taken into custody and delivered to an officer of the requesting state.

If the witness, who is summoned as above provided, after being paid or tendered by some properly authorized person the sum of twelve cents

(12¢) a mile for each mile by the ordinary traveled route or the actual expense of travel, lodging, and meals to and from the court where the prosecution or proceeding is pending or the grand jury or prosecuting attorney's investigation is being conducted and twenty-five dollars (\$25.00) for each day, that he is required to travel and attend as a witness, fails without good cause to attend and testify as directed in the summons, he shall be punished in the manner provided for the punishment of any witness who disobeys a summons issued from a court of record in this state.

As used in this subchapter, "prosecuting attorney's investigation" shall mean any investigation conducted by a prosecuting attorney in another state under a law substantially similar to § 16-43-212.

History. Acts 1935, No. 65, § 1; Pope's Dig., § 3942; 1977, No. 453, § 1; A.S.A. 1947, § 43-2005.

CASE NOTES

<p>Cited: Hale v. State, 246 Ark. 989, 440 S.W.2d 550 (1969); Hill v. Lewis, 361 F. Supp. 813 (E.D. Ark. 1973); Doles v. State, 275 Ark. 448, 631 S.W.2d 281 (1982);</p>	<p>Lackey v. State, 288 Ark. 225, 703 S.W.2d 858 (1986); Bussard v. State, 300 Ark. 174, 778 S.W.2d 213 (1989).</p>
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16-43-403. Witness from another state.

If a person in any state, which by its laws has made provision for commanding persons within its borders to attend and testify in criminal prosecutions or proceedings or grand jury or prosecuting attorney's investigations commenced or about to commence, in this state, is a material witness in a prosecution or proceeding pending in a court of record in this state, or in a grand jury or prosecuting attorney's investigation which has commenced or is about to commence, a judge of such court may issue a certificate under the seal of the court stating these facts and specifying the number of days the witness will be required. The certificate may include a recommendation that the witness be taken into immediate custody and delivered to an officer of this state to assure his attendance in this state. This certificate shall be presented to a judge of a court of record in the county in which the witness is found.

If the witness is summoned to attend and testify in this state he shall be tendered the sum of twelve cents (12¢) a mile for each mile by the ordinary traveled route or the actual expenses of travel, lodging, and meals to and from the court where the prosecution or proceeding is pending or the grand jury or prosecuting attorney's investigation is being conducted and twenty-five dollars (\$25.00) for each day that he is required to travel and attend as a witness. A witness who has appeared in accordance with the provisions of the summons shall not be required to remain within this state a longer period of time than the period mentioned in the certificate, unless otherwise ordered by the court. If

such witness, after coming into this state, fails without good cause to attend and testify as directed in the summons, he shall be punished in the manner provided for the punishment of any witness who disobeys a summons issued from a court of record in this state.

History. Acts 1935, No. 65, § 2; Pope's 1977, No. 453, § 2; A.S.A. 1947, § 43-Dig., § 3943; Acts 1953, No. 352, § 1; 2006.

CASE NOTES

ANALYSIS

In general.
Capital cases.
Compulsory process.
Discretion of court.
Expenses.
Reasonable efforts to procure witness.
Refusal to subpoena.
Witness taken into custody.

In General.

This section provides a mechanism for the defendant to request the court to order the attendance of the defendant's witnesses. *Perry v. Norris*, 879 F. Supp. 1503 (E.D. Ark. 1995), *aff'd*, 107 F.3d 665 (8th Cir. 1997).

Capital Cases.

Section 16-43-208, which provides for unlimited out-of-state witnesses in capital felony cases, must be read in conjunction with this section; such right to witnesses is not absolute but, rather, rests within the sound discretion of the trial judge. *Mackey v. State*, 279 Ark. 307, 651 S.W.2d 82 (1983).

Trial court erred in refusing to subpoena out-of-state government witnesses who performed certain tests which were negative or inconclusive in linking defendant to crime; however, error was harmless where other evidence available to jury indicated that test results were negative. *Mackey v. State*, 279 Ark. 307, 651 S.W.2d 82 (1983).

Compulsory Process.

The right to compulsory process is not absolute. In order to be entitled to compulsory process, the defendant must show how the witness' testimony would have been both material and favorable to his defense. *Wright v. Lockhart*, 914 F.2d 1093 (8th Cir. 1990), *cert. denied*, 498 U.S. 1126, 111 S. Ct. 1089, 112 L. Ed. 2d 1193 (1991).

In order to establish that noncompelled testimony is material, defendant must show that the suppressed evidence might have affected the outcome of the trial. *Wright v. Lockhart*, 914 F.2d 1093 (8th Cir. 1990), *cert. denied*, 498 U.S. 1126, 111 S. Ct. 1089, 112 L. Ed. 2d 1193 (1991).

Even if the denial of compulsory process amounts to constitutional error, federal circuit court will not reverse a conviction if the error is harmless. *Wright v. Lockhart*, 914 F.2d 1093 (8th Cir. 1990), *cert. denied*, 498 U.S. 1126, 111 S. Ct. 1089, 112 L. Ed. 2d 1193 (1991).

Trial court's refusal to compel the attendance of nonresident witnesses did not violate defendant's Sixth Amendment right to compulsory process. *Wright v. Lockhart*, 914 F.2d 1093 (8th Cir. 1990), *cert. denied*, 498 U.S. 1126, 111 S. Ct. 1089, 112 L. Ed. 2d 1193 (1991).

Discretion of Court.

The issuance of a petition for certification of a material nonresident witness, which compels attendance at government expense, is not an absolute right and lies within the discretion of the trial court. *Wright v. State*, 267 Ark. 264, 590 S.W.2d 15 (1979); *Logan v. State*, 300 Ark. 35, 776 S.W.2d 341 (1989); *Perry v. Norris*, 879 F. Supp. 1503 (E.D. Ark. 1995).

Although the court was unaware it had any authority to act under this section, the result was the same as if the trial court had knowingly exercised its discretion by deciding that it would not, under the facts and circumstances of this case, issue a certificate demanding that the Alabama authorities require the attendance of defendant's witnesses; the defendant's constitutional rights were not violated. *Perry v. Norris*, 879 F. Supp. 1503 (E.D. Ark. 1995), *aff'd*, 107 F.3d 665 (8th Cir. 1997).

There is no absolute right to the certification process created by this section; the

matter is within the discretion of the trial judge. *Rowbottom v. State*, 327 Ark. 76, 938 S.W.2d 224 (1997).

Expenses.

Where trial court had offered to allow the defendant to either bring four witnesses from out-of-state to testify at the trial or to take the depositions of an unlimited number of out-of-state witnesses, and the defendant chose to take the depositions, the defendant failed to establish that he was prejudiced by the court's failure to also allow him expenses for out-of-state witnesses since apparently all of the witnesses suggested by the defendant appeared at the trial anyway. *Perry v. State*, 277 Ark. 357, 642 S.W.2d 865 (1982).

Reasonable Efforts to Procure Witness.

It was reversible error to permit the reading in evidence of a transcript of evidence given by a witness at a previous trial because of the absence of the witness from the state when the state's efforts to obtain the presence of the witness at the trial was confined to the issuance of two subpoenas and did not include inquiries as to the exact whereabouts of the witness nor efforts to obtain his testimony under this section. *Satterfield v. State*, 248 Ark. 395, 451 S.W.2d 730 (1970).

Where state waited until it was too late to obtain witness under this section, the state's efforts were not reasonable; how-

ever, the state's misconduct in reading into the record the witness's testimony given at the first trial was harmless error, since the testimony was not critical because a rape victim's testimony need not be corroborated. *Holloway v. State*, 268 Ark. 24, 594 S.W.2d 2 (1980), cert. denied, 474 U.S. 836, 106 S. Ct. 111, 88 L. Ed. 2d 90 (1985).

Refusal to Subpoena.

Court did not abuse its discretion in refusing to subpoena out-of-state witnesses sought by the defendant in connection with his defense. *Wright v. State*, 267 Ark. 264, 590 S.W.2d 15 (1979).

Where defendant failed to support his claim that witness' out-of-state estranged husband was a material witness, the judge properly refused to compel his attendance. *Rowbottom v. State*, 327 Ark. 76, 938 S.W.2d 224 (1997).

Witness Taken into Custody.

Testimony of a material witness did not need to be suppressed because the witness was arrested and placed in jail for three days before she was transported back to this state; this section does contemplate that the material witness be taken into custody in the foreign state. *Verdict v. State*, 315 Ark. 436, 868 S.W.2d 443 (1993).

Cited: *Coble v. State*, 274 Ark. 134, 624 S.W.2d 421 (1981); *Leshe v. State*, 304 Ark. 442, 803 S.W.2d 522 (1991).

16-43-404. Witnesses immune from arrest.

If a person comes into this state in obedience to a summons directing him to attend and testify in a criminal prosecution in this state he shall not while in this state pursuant to such summons be subject to arrest or the service of process, civil or criminal, in connection with matters which arose before his entrance into this state under the summons.

If a person passes through this state while going to another state in obedience to a summons to attend and testify in a criminal prosecution in that state or while returning therefrom, he shall not while so passing through this state be subject to arrest or the service of process, civil or criminal, in connection with matters which arose before his entrance into this state under the summons.

History. Acts 1935, No. 65, § 3; Pope's Dig., § 3944; A.S.A. 1947, § 43-2007.

RESEARCH REFERENCES

Ark. L. Rev. Witness Privileges, 15
Ark. L. Rev. 93.

16-43-405. Uniformity of interpretation.

This subchapter shall be so interpreted and construed as to effectuate its general purpose to make uniform the law of the states which enact it.

History. Acts 1935, No. 65, § 4; A.S.A. 1947, § 43-2008.

16-43-406. Short title — Uniform Act.

This subchapter may be cited as the “Uniform Act to Secure the Attendance of Witnesses from Without the State in Criminal Cases”.

History. Acts 1935, No. 65, § 5; A.S.A. 1947, § 43-2009.

16-43-407. Repealer.

All acts or parts of acts inconsistent with this subchapter are hereby repealed.

History. Acts 1935, No. 65, § 6; A.S.A. 1947, § 43-2009n.

16-43-408. [Reserved.]

Publisher’s Notes. Section 8 of the ULA act, the severability provision, was not adopted in Arkansas.

16-43-409. Effective date.

Whereas, under the present statutes of the State of Arkansas there is no adequate remedy whereby the attendance of witnesses from without the state may be enforced, and whereas, it is necessary for the immediate preservation of the peace of the State of Arkansas that adequate means be provided whereby the attendance of witnesses from without the state may be had, an emergency is hereby declared and this subchapter shall become operative and in effect and be in force from and after its passage.

History. Acts 1935, No. 65, § 7; A.S.A. 1947, § 43-2009n.

Publisher’s Notes. Acts 1935, No. 65

was signed by the Governor and became effective on February 20, 1935.

SUBCHAPTER 5 — COMPETENCY — CRIMINAL PROCEEDINGS

SECTION.

16-43-501. Accused as witness.

16-43-502. Joint defendant as witness.

SECTION.

16-43-503. Party injured as witness.

Effective Dates. Acts 1885, No. 82,
§ 2: effective on passage.

RESEARCH REFERENCES

ALR. Court's witnesses (other than expert) in state criminal prosecution. 16 ALR 4th 352.

Am. Jur. 81 Am. Jur. 2d, Witn., § 69 et seq.

Ark. L. Rev. Theory of Testimonial

Competency and Privilege, 4 Ark. L. Rev. 377.

Character, Corruption and Contradiction in Arkansas, 15 Ark. L. Rev. 50.

C.J.S. 97 C.J.S., Witn., §§ 35 et seq., 49 et seq.

16-43-501. Accused as witness.

On the trial of all indictments, informations, complaints, and other proceedings against persons charged with the commission of crimes, offenses, and misdemeanors in this state, the person so charged shall, at his own request, but not otherwise, be a competent witness. The failure of the person so charged to make such a request shall not create any presumption against him.

History. Acts 1885, No. 82, § 1, p. 126;
C. & M. Dig., § 3123; Pope's Dig., § 3957;
A.S.A. 1947, § 43-2016.

CASE NOTES

ANALYSIS

Applicability.

Comments on failure to testify.

Cross-examination.

Directed verdict.

Immunity from testifying.

Instructions.

Applicability.

This section does not apply to the admission of a voluntary statement made by accused at a coroner's inquest. *Dunham v. State*, 207 Ark. 472, 181 S.W.2d 242 (1944).

Comments on Failure to Testify.

Prosecutor's comments on defendant's failure to testify held improperly allowed. *Curtis v. State*, 89 Ark. 394, 117 S.W. 521 (1909); *Porterfield v. State*, 145 Ark. 472,

224 S.W. 957 (1920); *Perry v. State*, 188 Ark. 133, 64 S.W.2d 328 (1933); *Freeman v. State*, 214 Ark. 359, 216 S.W.2d 864 (1949); *Bailey v. State*, 287 Ark. 183, 697 S.W.2d 110 (1985).

This section does not authorize the defendant's counsel to offer explanation as to defendant's failure to testify, so that where counsel for defendant stated that he did not take the stand because it was not necessary, he cannot complain that the prosecuting attorney replied that he could have taken the stand and denied the charge. *Collins v. State*, 143 Ark. 604, 221 S.W. 455 (1920).

It is error, presumptively prejudicial, for the prosecuting attorney to call attention of the jury to the failure of the accused to testify. *Bridgman v. State*, 170

Ark. 709, 280 S.W. 982 (1926); *Bradley v. State*, 320 Ark. 100, 896 S.W.2d 425 (1995).

The prosecuting attorney's statement was not a comment on the defendant's failure to testify but merely an argument that the named witnesses' testimony should be believed because undisputed. *Davis v. State*, 174 Ark. 891, 298 S.W. 359 (1927).

Prosecutor's remark in his opening statement to the effect that the decedent could not tell his side of the story and that it would all have to come from the defendant resulted in pre-evidentiary coercion which may have forced the defendant to testify against her will. *Clark v. State*, 256 Ark. 658, 509 S.W.2d 812 (1974).

A violation of this section, although presumptively prejudicial, can be harmless error if it is shown beyond a reasonable doubt that the error did not influence the verdict. *Bradley v. State*, 320 Ark. 100, 896 S.W.2d 425 (1995).

Although the prosecutor made an impermissible comment regarding witness' failure to testify, the overwhelming evidence of defendant's guilt rendered the improper comment harmless. *Landreth v. State*, 331 Ark. 12, 960 S.W.2d 434 (1998).

Cross-Examination.

When a defendant in a criminal case becomes a witness in his own behalf, he may be impeached on cross-examination and may be questioned as to whether he has formerly been convicted of an infamous crime. *Turner v. State*, 100 Ark. 199, 139 S.W. 1124 (1911).

Directed Verdict.

Court cannot direct verdict of guilty, although there is sufficient evidence to convict and such evidence is undenied, since defendant's failure to testify cannot create a presumption against him. *Paxton v. State*, 114 Ark. 393, 170 S.W. 80 (1914).

Immunity from Testifying.

Statements made by a witness in the presence of the accused before the exam-

ining court did not call for a denial from him as he was not required to testify in the case. *Maloney v. State*, 91 Ark. 485, 121 S.W. 728 (1909).

Even after an indictment is found, the person charged cannot be made a witness in the trial except at his own request. *Claborn v. State*, 115 Ark. 387, 171 S.W. 862 (1914).

The trial court erred in requiring defendant to take the witness stand when called as a witness by his codefendant when they were tried together. *Brown v. State*, 259 Ark. 449, 534 S.W.2d 213 (1976).

Instructions.

Where the accused has taken the stand as a witness and his testimony has been impeached by evidence of contradictory statements, it is the duty of the trial court to admonish the jury that the alleged conflicting statements are not to be considered as substantive proof of the accused's guilt. *Pinkerton v. State*, 126 Ark. 201, 190 S.W. 110 (1916).

An instruction that the defendant had a right to testify and the fact that he did not avail himself of this right was not to be considered against him, was not prejudicial to the defendant. *Scott v. State*, 169 Ark. 326, 275 S.W. 667 (1925).

Refusal of an instruction that the defendant's failure to testify was neither evidence nor presumption of guilt and should not be considered in determining guilt, was reversible error under this section. *Cox v. State*, 173 Ark. 1115, 295 S.W. 29 (1927). See *Martin v. State*, 151 Ark. 365, 236 S.W. 274 (1922).

Instruction that accused's failure to testify was not to be considered in determining his guilt, given without a request therefor, was not error. *Thompson v. State*, 205 Ark. 1040, 172 S.W.2d 234 (1943).

16-43-502. Joint defendant as witness.

When two (2) or more persons are indicted in the same indictment, each defendant may testify in behalf of, or against, the other defendants.

History. Acts 1893, No. 89, § 1, p. 157; C. & M. Dig., § 3124; Pope's Dig., § 3958; A.S.A. 1947, § 43-2017.

Cross References. Joint offender as witness before grand jury, § 16-85-506.

16-43-503. Party injured as witness.

No person shall be rendered incompetent to testify in criminal cases by reason of his being the person injured or defrauded, or intended to be injured or defrauded, or because he would be entitled to satisfaction for the injury or may be liable to pay the costs of prosecution.

History. Rev. Stat., ch. 45, § 166; C. & M. Dig., § 3121; Pope's Dig., § 3955; A.S.A. 1947, § 43-2018.

SUBCHAPTER 6 — IMMUNITY — CRIMINAL PROCEEDINGS

SECTION.

- 16-43-601. Definitions.
- 16-43-602. Penalty.
- 16-43-603. Immunity generally.
- 16-43-604. Issuance of order to testify.
- 16-43-605. Court order approving grant

SECTION.

- of immunity — Granting of immunity only after refusal to testify.
- 16-43-606. Limitation on immunity.

Preambles. Acts 1973, No. 561, contained a preamble which read: "Whereas, the law of the State of Arkansas is presently unsettled concerning the extent of authority of a prosecuting attorney to grant immunity from prosecution to persons testifying in criminal matters; and

"Whereas, said uncertainty results in difficulty for grand juries and prosecuting attorneys in obtaining necessary information about crimes committed in this State; and

"Whereas, because of the uncertainty as to the legality of prosecuting attorneys' granting of immunity, persons whose tes-

timony may be material to an investigation or prosecution are reluctant to testify under circumstances which may incriminate them; and

"Whereas, it is essential that guidelines be established in order to facilitate prosecutions and investigations of criminal matters, and to clarify the authority of the prosecuting attorney to grant persons immunity from prosecution where the testimony of the said person is material to an investigation or prosecution by the prosecuting attorney or a grand jury;

"Now, therefore...."

RESEARCH REFERENCES

ALR. Right of defendant in criminal proceeding to have immunity from prosecution granted to defense witness. 4 ALR 4th 617.

Prosecutor's power to grant prosecution witness immunity from prosecution. 4 ALR 4th 1221.

Enforceability of agreement not to prosecute if accused would help in criminal investigation or would become witness against others. 32 ALR 4th 990.

Ark. L. Rev. Farrow, New Jersey v. Portash: The Scope of Testimonial Immunity, 34 Ark. L. Rev. 306.

UALR L.J. Survey of Arkansas Law, Criminal Law, 1 UALR L.J. 153.

Note: An Equitable Treatment of Unauthorized Prosecutorial Promises of Immunity, 1 UALR L.J. 389.

Davis, Survey of Arkansas Law: Criminal Law, 2 UALR L.J. 193.

16-43-601. Definitions.

As used in this subchapter, unless the context otherwise requires:

(1) "Court" means the circuit court for the judicial district of this state in which the proceeding is or may be held;

(2) "Grand jury" means any grand jury impaneled in accordance with the laws of this state;

(3) "Prosecuting attorney" means the prosecuting attorney for the judicial district of this state in which the proceeding is or may be held and includes his duly appointed deputies.

History. Acts 1973, No. 561, § 1;
A.S.A. 1947, § 28-531.

CASE NOTES**Special Prosecutor.**

A special prosecutor appointed pursuant to § 16-21-112 or § 16-21-116 or by the inherent power of the circuit court may request the court to require that a person testify upon being granted immu-

nity as provided by this section. *Weems v. Anderson*, 257 Ark. 376, 516 S.W.2d 895 (1974).

Cited: *Hammers v. State*, 261 Ark. 585, 550 S.W.2d 432 (1977).

16-43-602. Penalty.

Any person who refuses to give testimony after an order has been issued by the circuit court for the judicial district in which the proceeding is or may be held directing him to give such testimony, as provided in this subchapter, shall be punished by a fine not to exceed the sum of fifty dollars (\$50.00) or imprisonment in the county jail for a period not to exceed ninety (90) days, or both. Each refusal of the witness to so testify shall constitute a separate offense.

History. Acts 1973, No. 561, § 5;
A.S.A. 1947, § 28-535.

16-43-603. Immunity generally.

Whenever a witness refuses, on the basis of his privilege of self-incrimination, to testify or provide other information in a proceeding before or ancillary to a court, a grand jury, or a prosecuting attorney and the person presiding over the proceeding communicates to the witness an order issued under this subchapter, the witness may not refuse to comply with the order on the basis of his privilege against self-incrimination. However, no testimony or other information compelled under the order, or any other information directly or indirectly derived from such testimony or other information, may be used against the witness in any criminal case except a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order.

History. Acts 1973, No. 561, § 2;
A.S.A. 1947, § 28-532.

CASE NOTES

ANALYSIS

Purpose.

Standing to contest immunity.

Purpose.

This section is not self-executing and its purpose is only to preserve the constitutional privilege of self-incrimination to one compelled to testify. *Hammers v. State*, 261 Ark. 585, 550 S.W.2d 432 (1977).

Standing to Contest Immunity.

A defendant has no standing to contest the kind of immunity granted to a witness; information gathered by virtue of witness' immunity, however, is a different matter, at least with respect to the use of such evidence against the person who was granted immunity. *Trimble v. State*, 316 Ark. 161, 871 S.W.2d 562 (1994).

Cited: *Balentine v. State*, 259 Ark. 590, 535 S.W.2d 221 (1976).

16-43-604. Issuance of order to testify.

(a) In the case of any individual who has been or may be called to testify or provide other information at any proceeding before or ancillary to a court, a grand jury, or a prosecuting attorney, the circuit court for the judicial district in which the proceeding is or may be held shall issue, in accordance with subsection (b) of this section and upon the request of the prosecuting attorney for the district, an order requiring the individual to give testimony or provide other information which he refuses to give or provide on the basis of his privilege against self-incrimination, such order to become effective as provided in this subchapter.

(b) A prosecuting attorney may request an order under subsection (a) of this section when, in his judgment:

(1) The testimony or other information from the individual may be necessary to the public interest; and

(2) The individual has refused or is likely to refuse to testify or provide other information on the basis of his privilege against self-incrimination.

History. Acts 1973, No. 561, § 3; A.S.A. 1947, § 28-533; Acts 1995, No. 1296, § 62.

Amendments. The 1995 amendment

substituted "this subchapter" for "§ 16-43-601" in (a).

CASE NOTES

Cited: *Rood v. State*, 4 Ark. App. 289, 630 S.W.2d 543 (1982).

16-43-605. Court order approving grant of immunity — Granting of immunity only after refusal to testify.

No prosecuting attorney shall grant immunity until he has applied for and obtained in each case a written order from the judge of the circuit court approving the grant of immunity. No such immunity shall be granted by a prosecuting attorney until after the individual has declined to answer questions or has requested immunity before answering questions.

History. Acts 1973, No. 561, § 4;
A.S.A. 1947, § 28-534.

CASE NOTES

ANALYSIS

Purpose.
Discretion of prosecutor.
No immunity granted.
Request for immunity.

Purpose.
Where the testimony of a defense witness was offered to impeach the credibility of a prosecution witness, to grant the defense witness immunity would defeat the purpose of this section, which is to aid the prosecution in apprehending criminals. *Fears v. State*, 262 Ark. 355, 556 S.W.2d 659 (1977).

Discretion of Prosecutor.
The granting of immunity is merely a statutory, not a constitutional, right and lies within the discretion of the prosecutor when he believes such grant is necessary to the public interest. *Fears v. State*, 262 Ark. 355, 556 S.W.2d 659 (1977).

No Immunity Granted.
The defendant in a prosecution for drug offenses was not entitled to immunity

since there was never any agreement to grant immunity made by the prosecuting attorney and, even if there had been such an agreement, there was no written court approval for it. *Tabor v. State*, 333 Ark. 429, 971 S.W.2d 227 (1998).

Request for Immunity.
Where prosecuting attorney did not request immunity for a defense witness and there was no evidence that the defendant had ever requested that the prosecutor seek immunity for the witness, the trial court did not err in refusing to grant immunity to the witness who was also charged with a murder arising out of the same altercation, since there was no statutory authority for a request of a grant of immunity by anyone other than the prosecuting attorney. *Rood v. State*, 4 Ark. App. 289, 630 S.W.2d 543 (1982).
Cited: *Hammers v. State*, 261 Ark. 585, 550 S.W.2d 432 (1977).

16-43-606. Limitation on immunity.

An individual who has once been granted immunity under the provisions of this subchapter for an offense in connection with which his testimony has been sought shall not again be granted immunity under this subchapter in connection with any subsequent offenses.

History. Acts 1973, No. 561, § 6;
A.S.A. 1947, § 28-536.

SUBCHAPTER 7 — EXAMINATION

SECTION.
16-43-701. Persons present compelled to testify.
16-43-702. Direct examination and cross-examination.

SECTION.
16-43-703. Reexamination of witnesses.

Publisher's Notes. Some provisions of this subchapter may be superseded by the Arkansas Rules of Civil Procedure pursuant to the Supersession Rule adopted by the Supreme Court of Arkansas in its order of December 18, 1978.

Cross References. Refusal to be sworn or answer questions as contempt, § 16-10-108.

RESEARCH REFERENCES

ALR. Manner or extent of examination of witnesses by trial judge. 6 ALR 4th 951.
Attorney's use of objectionable questions in examination of witness in state judicial proceeding as contempt of court. 31 ALR 4th 1279.

Am. Jur. 81 Am. Jur. 2d, Witn., §§ 23 et seq., 416 et seq.

C.J.S. 98 C.J.S., Witn., § 315 et seq.

16-43-701. Persons present compelled to testify.

A person present before a court or judicial officer may be compelled to testify in the same manner as if he were served with a subpoena.

History. Civil Code, § 659; C. & M. Dig., § 4192; Pope's Dig., § 5203; A.S.A. 1947, § 28-701.

16-43-702. Direct examination and cross-examination.

The examination of a witness by the party producing him is the direct examination. The examination of the same witness upon the same matter by the adverse party is the cross-examination. The direct examination must be completed before the cross-examination begins unless the court otherwise directs.

History. Civil Code, § 651; C. & M. Dig., § 4184; Pope's Dig., § 5194; A.S.A. 1947, § 28-704.

RESEARCH REFERENCES

Ark. L. Rev. Direct Examination of Witnesses, 15 Ark. L. Rev. 32.

CASE NOTES

ANALYSIS

Cross-examination.
Voir dire.

Cross-Examination.

Where a party neglected to introduce a contradictory written statement during his cross-examination of the witness who made it, it was in the discretion of the trial court to refuse him permission to inject it during cross-examination of another wit-

ness. Saint Louis, I.M. & S. Ry. v. Faisst, 68 Ark. 587, 61 S.W. 374 (1900).

Voir Dire.

It was reversible error to permit the defendants to engage in a lengthy voir dire examination of plaintiff's witnesses as to the basis of their opinions on matter at issue before such opinions had been given. Arkansas State Hwy. Comm'n v. Dipert, 249 Ark. 1145, 463 S.W.2d 388 (1971).

16-43-703. Reexamination of witnesses.

A witness once examined cannot be reexamined as to the same matter without leave of the court but may be reexamined as to any new matter upon which he has been examined by the adverse party. After the examination on both sides is concluded, the witness cannot be recalled without leave of the court.

History. Civil Code, § 657; C. & M. Dig., § 4190; Pope's Dig., § 5200; A.S.A. 1947, § 28-710.

CASE NOTES

ANALYSIS

Discretion of court.

Recall.

Reswearing.

Discretion of Court.

It is within the discretion of the trial court to permit the re-examination of witnesses after the case has been closed, and its doing so after the case has been submitted to the jury will not be held reversible error, unless that discretion has been abused. *Whittaker v. State*, 173 Ark. 1172, 294 S.W. 397 (1927); *Simmons v. State*, 184 Ark. 373, 42 S.W.2d 549 (1931).

This section permits recall "with leave of court," and that decision will not be reversed on appeal absent an abuse of discretion. *Davis v. State*, 318 Ark. 212, 885 S.W.2d 292 (1994).

Recall.

The refusal to permit a defendant to recall the prosecuting witness for further

cross-examination was not an abuse of discretion where the witness had been thoroughly cross-examined by the defendant's counsel. *Green v. State*, 185 Ark. 73, 46 S.W.2d 8 (1932).

There was no error in recalling witness to the stand where the judge was merely exercising his discretion and the court sustained all objections to the testimony offered. *Holmes v. State*, 257 Ark. 871, 520 S.W.2d 715 (1975).

Court did not abuse its discretion in allowing recall of victim to the stand after she had been allowed to remain in the courtroom during the playing of the defendant's tape-recorded confession. *Rolark v. State*, 299 Ark. 299, 772 S.W.2d 588 (1989).

Reswearing.

A witness, on being recalled, need not be sworn again. *Redd v. State*, 65 Ark. 475, 47 S.W. 119 (1898); *Teel v. State*, 129 Ark. 180, 195 S.W. 32 (1917).

SUBCHAPTER 8 — COMPENSATION

SECTION.

16-43-801. Witness fees generally.

16-43-802. Witness fees in county and probate courts.

SECTION.

16-43-803. [Superseded.]

16-43-804. Proof of attendance.

16-43-805. Fee for ferriage.

Cross References. Fee bills, § 16-68-501.

Effective Dates. Acts 1875, No. 77, § 53: effective on passage.

Acts 1885, No. 121, § 3: effective on passage.

16-43-801. Witness fees generally.

Witnesses shall be allowed compensation as follows:

(1) For attendance before any circuit court, arbitration, auditor, commissioner, or other persons in civil cases, five dollars (\$5.00) per day;

(2) For attendance in criminal cases, five dollars (\$5.00) per day;

(3) For attendance before a justice of the peace, fifty cents (50¢).

History. Acts 1875, No. 77, § 39, p. § 5700; Acts 1969, No. 157, § 1; 1975, No. 167; C. & M. Dig., § 4611; Pope's Dig., 344, § 1; A.S.A. 1947, § 28-524.

CASE NOTES**ANALYSIS**

Amount of fee.

Civil cases.

Expert.

Informant.

Amount of Fee.

The language in subdivision (2) which provides that witnesses in criminal cases shall be paid at a rate of \$5.00 per day is not intended to be a ceiling amount. *Williams v. State*, 304 Ark. 279, 801 S.W.2d 296 (1990).

Civil Cases.

In civil cases, witnesses are entitled to their ferriage and per diem in every case

in which they are summoned, however numerous. *Springfield & M.R.R. v. Lambert*, 42 Ark. 121 (1883).

Expert.

An expert cannot demand extra compensation. *Flinn v. Prairie County*, 60 Ark. 204, 29 S.W. 459 (1895).

Informant.

Payment of an informant's expenses is not precluded under subdivision (2), nor is any payment made to him by his employer. *Williams v. State*, 304 Ark. 279, 801 S.W.2d 296 (1990).

16-43-802. Witness fees in county and probate courts.

Witnesses, duly summoned, shall be allowed for their attendance as such before either county or probate courts the sum of one dollar (\$1.00) for each day's attendance, to be taxed as other costs and paid by the unsuccessful party.

History. Acts 1885, No. 121, § 2, p. 198; C. & M. Dig., § 4611; Pope's Dig., § 5700; A.S.A. 1947, § 28-525.

A.C.R.C. Notes. The Supreme Court of Arkansas stated in a Per Curiam of Nov.

24, 1986, that this section was deemed superseded by the Arkansas Rules of Civil Procedure to the extent it conflicts with ARCP 45(d).

16-43-803. [Superseded.]

A.C.R.C. Notes. The Supreme Court of Arkansas stated in a Per Curiam of Nov. 24, 1986, that this section, concerning mileage fees, was deemed superseded by the Arkansas Rules of Civil Procedure.

The section was derived from Acts 1875, No. 77, §§ 41, 42, p. 167; C. & M. Dig., §§ 4613, 4614; Pope's Dig., §§ 5702, 5703; A.S.A. 1947, §§ 28-526, 28-527.

16-43-804. Proof of attendance.

(a) Every account for attendance of a witness shall be sworn to and shall state that he was summoned to attend as a witness in the cause upon which the charge is made, shall state the number of days he attended, and, if the witness was summoned outside the limits of the county in which he resides, shall state the number of miles he traveled in consequence of the summons.

(b) Every witness shall prove his attendance at each term he may attend before any court, or each time he may attend before any justice of the peace, whether the case is determined or not, before the clerk of the court or the justice before which he may be summoned to appear.

History. Acts 1875, No. 77, §§ 43, 45, p. 167; C. & M. Dig., §§ 4615, 4616; Pope's Dig., §§ 5704, 5705; A.S.A. 1947, §§ 28-528, 28-529.

CASE NOTES

ANALYSIS

In general.
Costs.
Criminal cases.
Custom.

In General.

This section does not require that the account be signed by the witness, nor that he make affidavit to it. *Kansas City S. Ry. v. State*, 98 Ark. 179, 135 S.W. 846 (1911).

Costs.

The fee for taking witnesses' affidavits to their attendance is part of the costs of the case, and taxable as such. *Trimble v.*

St. Louis & S.F. Ry., 56 Ark. 249, 19 S.W. 839 (1892); *Logan County v. Trimm*, 57 Ark. 487, 22 S.W. 164 (1893).

Criminal Cases.

A witness is not entitled to attendance fee in criminal cases unless proved up in time. *Fulks v. State*, 64 Ark. 148, 41 S.W. 54 (1897); *Lansing Wheelbarrow Co. v. Montgomery*, 91 Ark. 600, 121 S.W. 1052 (1909).

Custom.

This section cannot be abrogated by custom. *Lansing Wheelbarrow Co. v. Montgomery*, 91 Ark. 600, 121 S.W. 1052 (1909).

16-43-805. Fee for ferriage.

Witnesses who leave home and attend any court in pursuance of a subpoena shall be allowed the amount necessarily paid out for crossing any ferry or toll bridge in going to and returning from the court.

History. Acts 1875, No. 77, § 46, p. 167; C. & M. Dig., § 4617; Pope's Dig., § 5706; A.S.A. 1947, § 28-530.

SUBCHAPTER 9 — PATERNITY OR CHILD SUPPORT

SECTION.

16-43-901. Competent witnesses.

16-43-901. Competent witnesses.

(a) The biological mother of a child shall be a competent witness to testify in any court proceeding or administrative hearing as to who is

the biological father of the child, the time and place of conception, access by the putative father and by her husband, support or lack of support for the child provided by the putative father or by her husband, and any other matters necessary to the establishment of paternity or a support obligation for the child.

(b) The husband of the biological mother shall be a competent witness to testify in any court proceeding or administrative hearing in which paternity or child support is an issue or may become an issue as to the following:

- (1) Date of marriage;
- (2) Period of cohabitation with the biological mother;
- (3) Period of nonaccess with the biological mother; and
- (4) Date of separation from the biological mother.

(c) The putative father of a child shall be a competent witness to testify in any court proceeding or administrative hearing in which paternity or child support is an issue or may become an issue as to the following:

- (1) Period of cohabitation with the biological mother;
- (2) Period of access with the biological mother; and
- (3) Lack of sexual contact with the biological mother.

(d) Upon a finding of the court by clear and convincing evidence that the presumption of legitimacy of a child born of a marriage has been rebutted, the court shall:

- (1) Relieve the putative father of further support liability;
- (2) Attempt to identify and establish the biological father of the child, if possible; and
- (3) Set a support obligation for the child to be paid by the biological father.

(e)(1) To assist the court in this determination, the court may direct the biological mother, her husband, the putative father, and the child to submit to one (1) or more blood tests or other scientific examinations or tests as provided in § 9-10-108.

(2) Such test results shall be admissible as provided in § 9-10-108.

(f) In any case where the court is unable to determine paternity for the child, the lawful husband of the biological mother shall be presumed to be the father of the child, and the court shall establish a support obligation for the child unless blood tests or other scientific evidence conclusively eliminate him from paternity consideration.

(g)(1) The purpose of this section is to enable the courts to receive into evidence relevant facts concerning the paternity of a child in any court proceeding or administrative hearing involving paternity or a support obligation for a child.

(2) The court shall consider foremost the interest of the child in making any determination hereunder and consider only testimony and evidence which will serve the best interest of the child in its findings pursuant to this section.

(h) As used in this section, "putative father" means any man, not deemed or adjudicated under the laws of the jurisdiction of the United

States to be the biological father of a child, who claims or is alleged to be the biological father of the child.

History. Acts 1989, No. 657, § 1; 1993, No. 431, § 1.

Amendments. The 1993 amendment rewrote (d)(1); added "Attempt to identify and" at the beginning of (d)(2) and "if possible" at the end of (d)(2); added "to be paid by the biological father" at the end of

(d)(3); designated the two sentences of (e) as (e)(1) and (e)(2); added "unless blood tests ... consideration" at the end of (f); and made minor stylistic changes.

Cross References. Paternity proceedings generally, § 9-10-101 et seq.

RESEARCH REFERENCES

UALR L.J. Survey, Family Law, 12 UALR L.J. 631.

Legislative Survey, Family Law, 16 UALR L.J. 131.

CASE NOTES

Presumption of Legitimacy.

In a divorce proceeding, the chancellor erred in illegitimizing the parties' eldest child, even though the evidence suggested the husband was not the child's father;

such was not in the child's best interest nor was it the goal of either parent. *Leach v. Leach*, 57 Ark. App. 155, 942 S.W.2d 286 (1997).

SUBCHAPTER 10 — MINORS

SECTION.

16-43-1001. Closed-circuit television.

16-43-1001. Closed-circuit television.

(a)(1) In any criminal proceeding, on motion of the prosecutor after notice to the defendant or on motion of the defense attorney, the court may, upon a showing of clear and convincing evidence that testifying in open court would be harmful or detrimental to the child, order that the testimony of a victim or witness who is a child twelve (12) years of age or under be taken outside the courtroom and the presence of the defendant and communicated to the courtroom by closed-circuit television.

(2) Any such motion shall only apply to the witnesses of the moving party and shall be filed no later than five (5) days before the trial is scheduled to begin, except in cases where, while testifying, it becomes apparent that the child cannot continue with his or her testimony.

(b) In ruling on the motion, the court shall consider the following factors:

- (1) The age and maturity of the child;
- (2) The possible effect that testimony in person may have on the child;
- (3) The extent of the trauma the child has already suffered;
- (4) The nature of the testimony to be given by the child;
- (5) The nature of the offense, including, but not limited to, the use of a firearm or any other deadly weapon during the commission of the

crime or the infliction of serious bodily injury upon the victim during the commission of the crime;

(6)(A) Threats made to the child or the child's family in order to prevent or dissuade the child from attending or giving testimony at any trial or court proceeding or to prevent the child from reporting the alleged offense or from assisting in criminal prosecution.

(B) Threats under this subdivision (b)(6) may include, but not be limited to, threats of serious bodily injury to be inflicted on the child or a family member, threats of incarceration or deportation of the child or a family member, or threats of removal of the child from the family or dissolution of the family;

(7) Conduct on the part of the defendant or the defendant's attorney which causes the child to be unable to continue his testimony; and

(8) Any other matter which the court considers relevant.

(c)(1)(A) If the court orders that the child's testimony be taken by closed-circuit television, the testimony shall be taken outside the courtroom in the judge's chambers or in another suitable location designated by the judge.

(B) Examination and cross-examination of the child shall proceed as though he or she were testifying in the courtroom.

(C) The only persons who may be permitted in the room with the child during the child's testimony are:

(i) The judge or a judicial officer appointed by the court;

(ii) The prosecutor;

(iii) The defense attorney, except a pro se defendant;

(iv) The child's attorney;

(v) Persons necessary to operate the closed-circuit television equipment; and

(vi) Any person whose presence is determined by the court to be necessary to the welfare and well-being of the child.

(2) The defendant shall be afforded a means of private, contemporaneous communication with the defendant's attorney during the testimony.

(d) This section does not preclude the presence of both the victim and the defendant in the courtroom together for purposes of establishing or challenging the identification of the defendant when identification is a legitimate issue in the proceeding.

(e) This section does not apply if the defendant is an attorney pro se unless the defendant has a court-appointed attorney assisting the defendant in the defense, in which case only the court-appointed attorney shall be permitted in the room with the child during the child's testimony.

(f) Nothing in this section creates a right of a child witness to a closed-circuit television procedure in lieu of testifying in open court and the intent of this section is that testimony by closed-circuit television be used in limited circumstances.

(g) Videotapes of closed-circuit testimony which are part of the court record are subject to a protective order of the court for the purpose of protecting the privacy of the alleged victim.

History. Acts 1997, No. 1186, § 1.

CHAPTER 44

DEPOSITIONS

SUBCHAPTER

1. GENERAL PROVISIONS. [SUPERSEDED.]
2. CRIMINAL PROCEEDINGS.

RESEARCH REFERENCES

Am. Jur. 23 Am. Jur. 2d, Depos. & Disc., § 108 et seq.

C.J.S. 26A C.J.S., Depos., § 1 et seq.

UALR L.J. Note, Constitutional Law—Confrontation Clause—Arkansas Child

Hearsay Exception Regarding Sexual Offenses, Abuse, Or Incest Is Unconstitutional. *George v. State*, 306 Ark. 360, 813 S.W.2d 792 (1991), 14 UALR L.J. 579.

SUBCHAPTER 1 — GENERAL PROVISIONS

[Superseded]

SECTION.

16-44-101 — 16-44-121. [Superseded.]

16-44-101 — 16-44-121. [Superseded.]

A.C.R.C. Notes. The Supreme Court of Arkansas has held, in *Per Curiam*s dated November 24, 1986 and November 21, 1988, that this subchapter is superseded in its entirety by the Arkansas Rules of Civil Procedure. The *Per Curiam* of Nov. 24, 1986, superseded §§ 16-44-107(a), 16-44-108, 16-44-114, and 16-44-116 — 16-44-120; the *Per Curiam* of Nov. 21, 1988, superseded §§ 16-44-101 — 16-44-106, 16-44-107(b), 16-44-109 — 16-44-113, 16-44-115, and 16-44-121. The subchapter was derived from the following sources:

16-44-101. Civil Code, § 606; C. & M. Dig., § 4205; Pope's Dig., § 5216; A.S.A. 1947, § 28-301.

16-44-102. Rev. Stat., ch. 48, §§ 16, 17; C. & M. Dig., §§ 4212-4214; Pope's Dig., §§ 5224-5226; A.S.A. 1947, §§ 28-305, 28-306.

16-44-103. Acts 1915, No. 290, § 17; C. & M. Dig., § 4206a; Pope's Dig., § 5218; A.S.A. 1947, § 28-308.

16-44-104. Civil Code, § 626; C. & M. Dig., § 4222; Pope's Dig., § 5234; A.S.A. 1947, § 28-315.

16-44-105. Civil Code, § 627; C. & M. Dig., § 4223; Pope's Dig., § 5235; A.S.A. 1947, § 28-316.

16-44-106. Civil Code, § 628; C. & M. Dig., § 4224; Pope's Dig., § 5236; A.S.A. 1947, § 28-317.

16-44-107. Civil Code, §§ 629, 637; Acts 1915, No. 290, § 20; C. & M. Dig., §§ 4225, 4230; Pope's Dig., §§ 5237, 5242; A.S.A. 1947, §§ 28-318, 28-323.

16-44-108. Rev. Stat., ch. 48, § 18; C. & M. Dig., § 4237; Pope's Dig., § 5249; A.S.A. 1947, § 28-332.

16-44-109. Rev. Stat., ch. 48, § 20; C. & M. Dig., § 4238; Pope's Dig., § 5250; A.S.A. 1947, § 28-333.

16-44-110. Civil Code, § 668; C. & M. Dig., §§ 4242, 4243; Pope's Dig., §§ 5254, 5255; A.S.A. 1947, § 28-336.

16-44-111. Civil Code, § 669; C. & M. Dig., § 4244; Pope's Dig., § 5256; A.S.A. 1947, § 28-337.

16-44-112. Civil Code, § 671; C. & M. Dig., § 4246; Pope's Dig., § 5258; A.S.A. 1947, § 28-339.

16-44-113. Civil Code, § 642; C. & M.

Dig., § 4247; Pope's Dig., § 5259; A.S.A. 1947, § 28-340.

16-44-114. Civil Code, § 648; C. & M. Dig., § 4239; Pope's Dig., § 5251; A.S.A. 1947, § 28-346.

16-44-115. Acts 1953, No. 335, Preliminary; A.S.A. 1947, § 28-347.

16-44-116. Acts 1953, No. 335, § 1; A.S.A. 1947, § 28-348.

16-44-117. Acts 1953, No. 335, § 2; A.S.A. 1947, § 28-349.

16-44-118. Acts 1953, No. 335, § 3; A.S.A. 1947, § 28-350.

16-44-119. Acts 1953, No. 335, § 6; 1957, No. 344, § 1; A.S.A. 1947, § 28-353.

16-44-120. Acts 1953, No. 335, § 7; A.S.A. 1947, § 28-354.

16-44-121. Acts 1957, No. 288, § 2; A.S.A. 1947, § 28-361.

SUBCHAPTER 2 — CRIMINAL PROCEEDINGS

SECTION.

16-44-201. Authorization for deposition generally — Manner of taking — Use.

16-44-202. Deposing witnesses upon showing of inability to attend trial — Use of depositions.

SECTION.

16-44-203. Videotaped deposition of alleged victim under 17 years of age in sexual offense prosecution.

Effective Dates. Acts 1979, No. 1022, § 3: Apr. 18, 1979. Emergency clause provided: "It has been found and is declared by the General Assembly of Arkansas that there is presently great confusion as to whether present law allows the use of depositions in criminal cases by both the state and defense, that fundamental fairness requires that the use of depositions be reciprocal, and that there is need for clarification of the statute authorizing the taking of such depositions. Therefore, an emergency is declared to exist, and this Act being necessary for the preservation of the public peace, health and safety, and for the effective and fair administration of justice, shall take effect and be in force from the date of its approval."

Acts 1983, No. 407, § 3: Mar. 13, 1983. Emergency clause provided: "It is hereby found and determined by the General Assembly that the present law authorizing videotaped depositions of minors who are

victims of sexual offenses has been construed to preclude direct testimony by the minor victim at trial if a videotaped deposition is taken; that, in some circumstances, direct testimony should be allowed in addition to or in place of videotaped depositions; that the present interpretation has resulted in injustice, and this Act is immediately necessary to rectify the same. It is not the purpose of this Act to circumvent the original purpose of Act 368 of 1981, which was to protect the minor victim from the trauma of testifying in open court. However, it is recognized that in some limited circumstances the interest in protecting the child is outweighed by the interest in convicting a guilty defendant. Therefore, an emergency is hereby declared to exist and this Act being immediately necessary for the preservation of the public peace, health and safety shall be in full force and effect from and after its passage and approval."

RESEARCH REFERENCES

ALR. Accused's right to depose prospective witnesses before trial in state court. 2 ALR 4th 704.

Ark. L. Notes. Watkins, Using the

Freedom of Information Act as a Discovery Device, 1994 Ark. L. Notes 59.

Ark. L. Rev. Jones, Lex, Lies & Videotape, 18 UALR L.J. 613.

16-44-201. Authorization for deposition generally — Manner of taking — Use.

(a) The court or judge in vacation, or a Justice of the Supreme Court, may authorize either party to take the deposition of a material witness where there are reasonable grounds to apprehend that, before trial, the witness will die, will become mentally incapable of giving testimony or physically incapable of attending the trial, or will become a nonresident of the state. The materiality of the testimony and the reason for taking the deposition shall be shown by affidavit.

(b) The court or judge shall, by written order, prescribe the manner of taking the deposition whether by interrogatories or upon notice to the parties.

(c) Upon the death of the witness, or upon his becoming mentally incapable of testifying or a nonresident of the state and absent therefrom so that he could not be summoned, the deposition taken in pursuance of such order may be read as evidence, provided that the grounds of nonresidence and absence from the state shall not be sufficient unless the party wishing to use the deposition makes an affidavit that he has tried in good faith to procure the attendance of such witness and been unable to do so.

History. Crim. Code, § 154; C. & M. Dig., §§ 3112-3115; Pope's Dig., §§ 3946-3949; Acts 1979, No. 1022, § 1; A.S.A. 1947, § 43-2011.

Cross References. Prisoners, deposition of, § 16-43-213.

CASE NOTES

ANALYSIS

In general.
Due diligence.
Nonresidents.
Objection.
Quashing depositions.

In General.

This section provides the method of taking depositions in criminal cases. *Bailey v. State*, 227 Ark. 889, 302 S.W.2d 796, cert. denied, 355 U.S. 851, 78 S. Ct. 77, 2 L. Ed. 2d 59 (1957).

The right to take depositions in a law case rests upon statutory authority and in no case can the right be exercised unless the authority therefor exists. *Russell v. State*, 269 Ark. 44, 598 S.W.2d 96 (1980).

Due Diligence.

Mere issuance of a subpoena does not constitute due diligence that would justify continuance to take deposition of absent witness; the accused must also make an effort to ascertain what progress is being

made in the due service of same. *Jones v. State*, 205 Ark. 806, 171 S.W.2d 298 (1943).

Defendant's application to take a deposition from a nonresident witness was properly overruled where the defendant did not exercise due diligence. *Criner v. State*, 236 Ark. 220, 365 S.W.2d 252 (1963).

Nonresidents.

Defendants in criminal cases are entitled to take the depositions of witnesses residing out of the state, and the Supreme Court will compel the circuit court by mandamus to make the order necessary to take depositions of nonresidents. *Gibony v. Rogers*, 32 Ark. 462 (1877).

Objection.

Where the prosecuting attorney signed a stipulation agreeing that the deposition of a certain witness might be taken before any notary public and waiving all formalities, and the deposition was taken before a justice of the peace and filed with the

clerk six days before the trial, an objection at the trial that the deposition was not taken before a notary public was not taken in apt time. *Seamster v. State*, 74 Ark. 579, 86 S.W. 434 (1905).

Quashing Depositions.

It is proper to quash depositions not taken by consent or pursuant to order. *McDonald v. State*, 155 Ark. 142, 244 S.W. 20 (1922).

Subpoena duces tecum directing corporate official to appear at pretrial deposition with all records relating to work and

pay records of co-workers involved in dispute was properly quashed despite defendant's claim that the information was relevant to his defense, since the issue of discrimination by the employer was irrelevant to the dispute and, moreover, there was not statutory authority for the taking of a pretrial deposition in such circumstances. *Kelley v. State*, 7 Ark. App. 130, 644 S.W.2d 638 (1983).

Cited: *State v. Russell*, 271 Ark. 817, 611 S.W.2d 518 (1981); *Shelton v. State*, 287 Ark. 322, 699 S.W.2d 728 (1985).

16-44-202. Deposing witnesses upon showing of inability to attend trial — Use of depositions.

(a) If it appears that a prospective witness may be unable to attend or be prevented from attending a trial or hearing, that his testimony is material, and that it is necessary to take his deposition in order to prevent a failure of justice, the court at any time after the filing of an indictment or information may order, upon motion of either party and notice to the parties, that his testimony be taken by deposition and that any designated books, papers, documents, or tangible objects not privileged be produced at the same time and place. If a witness is committed for failure to give bail to appear to testify at a trial or hearing, the court on written motion of the witness and upon notice to the parties may direct that his deposition be taken. After the deposition has been subscribed, the court may discharge the witness.

(b) If a defendant is without counsel, the court shall advise him of the right provided for in subsection (a) of this section and assign counsel to represent him unless the defendant elects to proceed without counsel or is able to obtain counsel. If it appears that a defendant at whose instance a deposition is to be taken cannot bear the expense thereof, the court may direct that the expenses of travel and subsistence of the defendant's attorney for attendance at the examination shall be paid by the state.

(c) A deposition shall be taken in the manner provided in civil actions. The court at the request of either party may direct that a deposition be taken on written interrogatories in the manner provided in civil actions.

(d) At the trial or upon any hearing, a part or all of a deposition, so far as otherwise admissible under the rules of evidence, may be used if it appears:

(1) That the witness is dead;

(2) That the witness is out of the State of Arkansas unless it appears that the absence of the witness was procured by the party offering the deposition;

(3) That the witness is unable to attend or testify because of sickness or infirmity; or

(4) That the party offering the deposition has been unable to procure the attendance of the witness by subpoena. Any deposition may also be used by any party for the purpose of contradicting or impeaching the testimony of the deponent as a witness. If only a part of a deposition is offered in evidence by a party, an adverse party may require him to offer all of it which is relevant to the part offered and any party may offer other parts.

(e) Objections to receiving in evidence a deposition or part thereof may be made as provided in civil actions.

(f) This section shall be applicable to municipal, police, and circuit courts of this state.

History. Acts 1971, No. 381, §§ 1, 4; 1979, No. 1022, § 2; A.S.A. 1947, §§ 43-2011.1, 43-2011.4.

RESEARCH REFERENCES

Ark. L. Rev. Arkansas' 1971 Criminal Discovery Act, 26 Ark. L. Rev. 1.
Criminal Procedure: A Survey of Arkan-

sas Law and the American Bar Association's Standards, 26 Ark. L. Rev. 169.

CASE NOTES

ANALYSIS

Applicability.

Error.

Expenses.

Quashing deposition.

Applicability.

This section authorized defendant, who was charged with drunken driving, to obtain for additional testing a perchlorate tube which the city police had used in making a blood-alcohol test. *City of Rogers v. Municipal Court*, 259 Ark. 43, 531 S.W.2d 257 (1976).

Error.

Where the deposition testimony of witnesses was obviously damaging to the defendant and it was especially critical that the jury be able to observe these witnesses on the stand, it was error to allow their testimony by deposition without any showing that the witnesses could not attend trial. *Bennett v. State*, 297 Ark. 115, 759 S.W.2d 799 (1988), cert. denied, 498 U.S. 851, 111 S. Ct. 144, 112 L. Ed. 2d 110 (1990).

Expenses.

Where trial court had offered to allow the defendant to either bring four witnesses from out-of-state to testify at the

trial or to take the depositions of an unlimited number of out-of-state witnesses, and the defendant chose to take the depositions, the defendant failed to establish that he was prejudiced by the court's failure to also allow him expenses for out-of-state witnesses since apparently all of the witnesses suggested by the defendant appeared at the trial anyway. *Perry v. State*, 277 Ark. 357, 642 S.W.2d 865 (1982).

Quashing Deposition.

Subpoena duces tecum directing corporate official to appear at pretrial deposition with all records relating to work and pay records of co-workers involved in dispute was properly quashed despite defendant's claim that the information was relevant to his defense, since the issue of discrimination by the employer was irrelevant to dispute and, moreover, there was no statutory authority for the taking of a pretrial deposition in such circumstances. *Kelley v. State*, 7 Ark. App. 130, 644 S.W.2d 638 (1983).

Cited: *Mosby v. State*, 249 Ark. 17, 457 S.W.2d 836 (1970); *Sanders v. State*, 276 Ark. 342, 635 S.W.2d 222 (1982); *Shelton v. State*, 287 Ark. 322, 699 S.W.2d 728 (1985); *Bussard v. State*, 300 Ark. 174, 778 S.W.2d 213 (1989).

16-44-203. Videotaped deposition of alleged victim under 17 years of age in sexual offense prosecution.

(a) As used in this section, the term "videotaped deposition" means the visual recording on a magnetic tape, together with the associated sound, of a witness testifying under oath in the course of a judicial proceeding, upon oral examination and where an opportunity is given for cross-examination in the presence of the defendant and intended to be played back upon the trial of the action in court.

(b) In any prosecution for a sexual offense or criminal attempt to commit a sexual offense against a minor, upon motion of the prosecuting attorney and after notice to the opposing counsel, the court may, for good cause shown, order the taking of a videotaped deposition of any alleged victim under the age of seventeen (17) years. The videotaped deposition shall be taken before the judge in chambers in the presence of the prosecuting attorney, the defendant, and the defendant's attorneys. Examination and cross-examination of the alleged victim shall proceed at the taking of the videotaped deposition in the same manner as permitted at trial under the provisions of the Arkansas Uniform Rules of Evidence.

(c) Any videotaped deposition taken under the provisions of this section shall be admissible at trial and received into evidence in lieu of the direct testimony of the alleged victim. However, neither the presentation nor the preparation of such videotaped deposition shall preclude the prosecutor's calling the alleged victim to testify at trial if that is necessary to serve the interests of justice.

(d) Videotapes which are a part of the court record are subject to a protective order of the court for the purpose of protecting the privacy of the alleged victim.

History. Acts 1981, No. 368, §§ 1-3; 1983, No. 407, § 1; A.S.A. 1947, §§ 43-2035 — 43-2037.

RESEARCH REFERENCES

Ark. L. Notes. Gitelman and Watkins, No Requiem for Ricarte: Separation of Powers, the Rules of Evidence, and the Rules of Civil Procedure, 1991 Ark. L. Notes 27.

Ark. L. Rev. Case Notes, McGuire v. State: Arkansas Child Abuse Videotape Deposition Laws, Etc., 41 Ark. L. Rev. 155.

Jones, Lex, Lies & Videotape, 18 UALR L.J. 613.

UALR L.J. Legislative Survey, Criminal Law, 4 UALR L.J. 583.

Arkansas Law Survey, Junean, Constitutional Law, 9 UALR L.J. 111.

Survey—Evidence, 11 UALR L.J. 205.

Note, Evidence — The Confrontation Clause — A Literal Right to a Face-to-Face Meeting, Coy v. Iowa, 108 S. Ct. 2798 (1988), 11 UALR L.J. 591.

Survey, Criminal Procedure, 13 UALR L.J. 349.

CASE NOTES

ANALYSIS

Constitutionality.

Construction.

Calling of victim to testify.

Competency.

Credibility.

Good cause.

Prejudicial error.

Constitutionality.

This section affords due process because it only applies to situations where the state has a compelling interest, the protection of children from sexual crimes against which children are virtually defenseless, and uses the least restrictive means of protecting that interest by applying only to sexual offenses against children. *McGuire v. State*, 288 Ark. 388, 706 S.W.2d 360 (1986).

The state has a legitimate interest in the general welfare of minor victims of sex crimes and their protection against further trauma in relating the incident in a crowded courtroom, and this section applies the least restrictive means of carrying out that interest and adequately protects basic constitutional rights of the accused. *Chappell v. State*, 18 Ark. App. 26, 710 S.W.2d 214 (1986).

This section provides a reasonable rule of thumb to guide judges in determining whether a videotaped deposition is justified; therefore, the term "good cause" is not unconstitutionally vague. *McGuire v. State*, 288 Ark. 388, 706 S.W.2d 360 (1986); *Davis v. State*, 24 Ark. App. 152, 751 S.W.2d 11 (1988).

This section requires face-to-face confrontation between the victim, the defendant, and his attorney at the time the deposition is taken and provides the opportunity for cross-examination of the victim by the defendant; therefore, the defendant is not deprived of the right to confront his accuser or witnesses against him. *McGuire v. State*, 288 Ark. 388, 706 S.W.2d 360 (1986).

This section involves procedure and evidence, but has not been preempted by rules of court, and is not an unconstitutional violation of the separation of powers doctrine. *Curtis v. State*, 301 Ark. 208, 783 S.W.2d 47 (1990).

Construction.

The mandatory language of this section is clear and unambiguous. Therefore, when a videotaped deposition is taken of a minor victim, the victim's videotaped depositions must be viewed and heard at trial and entered into the record in lieu of the direct testimony of the alleged victim. *State v. Lee*, 277 Ark. 142, 639 S.W.2d 745 (1982).

Calling of Victim to Testify.

The provision in this section which permits the prosecutor to call the minor victim to testify even though the victim's testimony has been videotaped is not discriminatory; the advantage to the state, if any, resulting from that provision is rationally related to the state's interest in protecting young witnesses to the extent that the ends of justice will permit, and its exercise is conditioned upon a showing of necessity to serve the interest of justice. *Chappell v. State*, 18 Ark. App. 26, 710 S.W.2d 214 (1986).

Competency.

The trial court did not err in failing to suppress a videotaped deposition of children's testimony on the ground that it contained no evidence that the children were qualified as to their competency to testify where, although the deposition as presented to the jury contained no questions pertaining to the children's competency to testify, the record clearly indicated that such questions were asked and answered but were inadvertently left off the videotape. *Hendricks v. State*, 15 Ark. App. 378, 695 S.W.2d 843 (1985).

The court declined to accept defendant's suggestion that it should alter its standard when reviewing the competency of witnesses in cases where testimony has been videotaped. In Arkansas the competency of children to testify in criminal matters has been found to be within the discretion of the trial court since at least 1869, and the court could see no good reason to adopt two different standards of review; one for cases where testimony is preserved on videotape, and another standard for when the witness testifies in person. *Davis v. State*, 24 Ark. App. 152, 751 S.W.2d 11 (1988).

Where competency of a witness is at

issue on appellate review, there is no good reason to employ de novo review when testimony is by videotape and to employ an abuse-of-discretion standard of review when the witness testifies in person. *Curtis v. State*, 301 Ark. 208, 783 S.W.2d 47 (1990).

Where the victim's answers to questions were at times inconsistent, but more often than not she displayed a clear understanding of the undesirable consequences of telling a falsehood, and conversely, she understood the positive and desirable consequences of telling the truth, she clearly had "a moral awareness of the duty to tell the truth," and the trial court did not abuse its discretion in determining the victim was competent and in allowing her to testify by means of a videotaped deposition. *Richard v. State*, 306 Ark. 543, 815 S.W.2d 941 (1991).

Credibility.

Videotaped testimony does not deprive the jury of the opportunity of determining the victim's credibility. *McGuire v. State*, 288 Ark. 388, 706 S.W.2d 360 (1986).

Good Cause.

Where the testimony of the grandparents indicated that the child could be seriously harmed if forced to appear before a jury, the evidence substantiated the trial judge's decision that it was in the best interest of the child to allow the videotaped deposition. *McGuire v. State*, 288 Ark. 388, 706 S.W.2d 360 (1986).

This section does not require the state to submit its showing of good cause by expert testimony; therefore, the case-worker's testimony was properly accepted by the court as establishing good cause sufficient to allow a videotaped deposition,

even though she had received no specialized training in dealing with victims of sexual abuse and had no contact with this victim prior to the crime. *Chappell v. State*, 18 Ark. App. 26, 710 S.W.2d 214 (1986).

Trial judge made a finding of good cause, and in view of the girls' ages, the sexual abuse they had endured, and the social worker's testimony, judge did not abuse his discretion in permitting videotaped deposition. *Cope v. State*, 293 Ark. 524, 739 S.W.2d 533 (1987).

Although testimony about the emotional impact on the child witness would be desirable, under the facts in the case, the absence of such testimony was not fatal to the trial court's finding of good cause. *Davis v. State*, 24 Ark. App. 152, 751 S.W.2d 11 (1988).

Testimony of victim's mother provided ample basis for a finding of good cause. *Greenlee v. State*, 318 Ark. 191, 884 S.W.2d 947 (1994).

Prejudicial Error.

Admission of videotaped deposition into evidence was prejudicial error in that the defendant was denied the right to cross-examine the child at the time she made her videotaped statement and the state was in effect permitted to offer the direct testimony of the victim twice, once through the videotape and once through live testimony. *Cogburn v. State*, 292 Ark. 564, 732 S.W.2d 807 (1987).

Cited: *Lasiter v. State*, 290 Ark. 96, 717 S.W.2d 198 (1986); *Hegwood v. State*, 297 Ark. 218, 760 S.W.2d 859 (1988); *Logan v. State*, 299 Ark. 255, 773 S.W.2d 419 (1989); *Kester v. State*, 303 Ark. 303, 797 S.W.2d 704 (1990); *Cranford v. State*, 303 Ark. 393, 797 S.W.2d 442 (1990).

CHAPTER 45

AFFIDAVITS

SECTION.

- 16-45-101. Use of affidavits.
- 16-45-102. Officials before whom affidavits may be made.
- 16-45-103. Signature of affiant — Certificate of officer.
- 16-45-104. Affidavit as to correctness of account.

SECTION.

- 16-45-105. Production of affiant for cross-examination upon motion to discharge provisional remedy.

Publisher's Notes. Some provisions of this chapter may be superseded by the ARCP pursuant to the Supersession Rule adopted by the Supreme Court of Arkansas in its order of December 18, 1978.

Effective Dates. Acts 1867, No. 102, § 3: effective on passage.
Acts 1895, No. 83, § 4: effective on passage.

RESEARCH REFERENCES

ALR. Admissibility of affidavit to impeach witness. 14 ALR 4th 828.

Am. Jur. 3 Am. Jur. 2d, Affid., § 1 et seq.

C.J.S. 2A C.J.S., Affid., § 1 et seq.

16-45-101. Use of affidavits.

An affidavit may be read to verify a pleading; to prove the service of a summons, notice, or other process in an action; to obtain a provisional remedy, a stay of proceedings, or a warning order, upon a motion; and in any other case permitted by law.

History. Civil Code, § 600; C. & M. Dig., § 4199; Pope's Dig., § 5210; A.S.A. 1947, § 28-201.

Cross References. Proof of service by affidavit, § 16-58-116.

RESEARCH REFERENCES

UALR L.J. Sullivan, The Need for a Business or Payroll Records Affidavit for

Use in Child Support Matters, 11 UALR L.J. 651.

CASE NOTES

Opportunity to Cross-Examine.

An affidavit is not allowable on a trial of issues raised by the pleadings, unless an opportunity has been given the adverse party to cross-examine the affiant. *Smith v. Feltz*, 42 Ark. 355 (1883); *Western*

Union Tel. Co. v. Gillis, 89 Ark. 483, 117 S.W. 749 (1915); *Johnson v. Johnson*, 122 Ark. 276, 182 S.W. 897 (1916).

Cited: *Hamlen & Son v. Allen*, 186 Ark. 1104, 57 S.W.2d 1046 (1932).

16-45-102. Officials before whom affidavits may be made.

(a) An affidavit may be made in this state before a judge of the court, justice of the peace, notary public, clerk of a court, or mayor of a city or incorporated town.

(b) An affidavit may be made out of this state before a commissioner appointed by the Governor of this state to take depositions, or before a judge of a court, mayor of a city, notary public, or justice of the peace, whose certificate shall be proof of the time and manner of its being made.

History. Civil Code, §§ 602, 603; Acts 1895, No. 83, § 2, p. 111; C. & M. Dig.,

§§ 4202, 4203; Pope's Dig., §§ 5213, 5214; A.S.A. 1947, §§ 28-204, 28-205.

Cross References. Armed forces personnel making oath, affidavits before officers, § 16-2-104.

CASE NOTES

Validity.

An affidavit made to the correctness of a claim for a mechanic's lien is valid in this state when made in another state and

valid under the law. *Terry v. Klein*, 133 Ark. 366, 201 S.W. 801 (1918).

Cited: *Whitaker v. State*, 37 Ark. App. 112, 825 S.W.2d 827 (1992).

16-45-103. Signature of affiant — Certificate of officer.

Every affidavit shall be subscribed by the affiant. The certificate of the officer before whom the affidavit is made shall be written separately following the signature of the affiant.

History. Civil Code, § 605; C. & M. Dig., § 4204; Pope's Dig., § 5215; A.S.A. 1947, § 28-206.

CASE NOTES

ANALYSIS

Construction.
Compliance.

Construction.

The requirement that the affidavit shall be subscribed by the affiant is merely directory. *Gill v. Ward*, 23 Ark. 16 (1861); *Mahan v. Owen*, 23 Ark. 347 (1861).

Compliance.

There was substantial compliance with statutory requirements with respect to consent to adoption where notary exe-

cuted and acknowledged mother's signature, saw mother sign consent and heard explanation given to her by attorney, even though there was no evidence to effect that mother held up her hand while notary recited a formal oath. *A & B v. C & D*, 239 Ark. 406, 390 S.W.2d 116, cert. denied, 382 U.S. 926, 86 S. Ct. 314, 15 L. Ed. 2d 340 (1965).

Cited: *Thompson v. Self*, 197 Ark. 70, 122 S.W.2d 182 (1938); *Thomas v. Hawkins*, 217 Ark. 787, 233 S.W.2d 247 (1950); *Whitaker v. State*, 37 Ark. App. 112, 825 S.W.2d 827 (1992).

16-45-104. Affidavit as to correctness of account.

In any suit on an account in any of the courts of this state, the affidavit of the plaintiff, duly taken and certified according to law, that the account is just and correct shall be sufficient to establish the account, unless the defendant denies under oath the correctness of the account, either in whole or in part, in which case the plaintiff shall be held to prove by other evidence such part of his account as is thus denied.

History. Acts 1867, No. 102, § 1, p. 210; C. & M. Dig., § 4200; Pope's Dig., § 5211; A.S.A. 1947, § 28-202.

CASE NOTES

ANALYSIS

Applicability.
 Default judgment.
 Failure to file.
 Prima facie case.
 Sufficiency of verification.

Applicability.

This section does not apply where, in an action on notes, an account is offered in evidence to show consideration for the notes. *Boone v. Goodlett & Co.*, 71 Ark. 577, 76 S.W. 1059 (1903).

Default Judgment.

Where the action is not founded on a verified account, and the allegations of the complaint are denied in the answer, it is error to render judgment for plaintiff by default. *Barnes v. Balz*, 173 Ark. 417, 292 S.W. 391 (1927).

In action on open account supported by verified affidavit as to amount, judgment was properly entered in favor of plaintiff where defendant failed to appear. *Terry v. Esso Std. Oil Co.*, 220 Ark. 694, 249 S.W.2d 577 (1952).

Where there was filed with the complaint a verified statement of the account, it was sufficient to support a default judgment. *Walden v. Metzler*, 227 Ark. 782, 301 S.W.2d 439 (1957).

Failure to File.

A complaint in an action on a contract for services rendered is not, if it states a cause of action, demurrable (now, subject to motion to dismiss) because the plaintiff failed to file an affidavit to establish the account sued on, as required by this section. *Bailey v. Fenter*, 176 Ark. 1075, 5 S.W.2d 291 (1928).

Prima Facie Case.

Though an account sued on, duly verified, is prima facie correct, where the defendant does not deny its correctness under oath, such prima facie case may be overcome by the plaintiff's testimony showing that he had no account against

the defendant. *Wilbur v. Ellefson*, 95 Ark. 403, 129 S.W. 812 (1910).

A verified account is prima facie correct. *Chicago Crayon Co. v. Choate*, 102 Ark. 603, 145 S.W. 197 (1912); *Ike Stiel & Co. v. Geo. P. Ide & Co.*, 116 Ark. 244, 172 S.W. 871 (1915).

This section is merely a rule of evidence, and if the allegations of a verified complaint and the sworn-to items of the exhibit to that complaint are not controverted, the allegations sworn to would be a prima facie showing on which a judgment for the complainant would be sustained; the verity of the material in the statement may be denied by defendant by affidavit filed in the case, by verified answer, or by defendant's testimony under oath as a witness in the case. *McWater v. Ebone*, 234 Ark. 203, 350 S.W.2d 905 (1961).

Where plaintiff attached to his verified complaint a sworn statement of account listing only by numbers invoices with items of credit, such verified account was only prima facie evidence of its correctness, and defendant's answer denying each and every allegation of the complaint, together with his amended answer sworn to by his attorney and setting up a valid defense, was sufficient to join the issues of the case. *McWater v. Ebone*, 234 Ark. 203, 350 S.W.2d 905 (1961).

Sufficiency of Verification.

Judgment for plaintiff warranted. *Clarke v. John Wanamaker*, 184 Ark. 73, 40 S.W.2d 784 (1931); *Cawood v. Pierce*, 232 Ark. 721, 339 S.W.2d 861 (1960); *Smith v. Chicot-Lipe Ins. Agency*, 11 Ark. App. 49, 665 S.W.2d 907 (1984).

Affidavit of plaintiff, made before a notary public, was sufficient verification of itemized statement of open account. *Burns v. Hall*, 234 Ark. 943, 356 S.W.2d 235 (1962).

Cited: *Rice v. Kroeck*, 2 Ark. App. 223, 619 S.W.2d 691 (1981); *Worthen Bank & Trust Co. v. Adair*, 15 Ark. App. 144, 690 S.W.2d 727 (1985).

16-45-105. Production of affiant for cross-examination upon motion to discharge provisional remedy.

Where a provisional remedy is granted upon an affidavit and a motion is made to discharge or vacate the remedy, either before or after

pleading to the cause, the party against whom the remedy is granted may, by written notice to the party by whom it was obtained or by an order or rule of the court, require the production of the person who made the affidavit for cross-examination. Thereupon, the party notified shall produce the affiant within ten (10) days before an officer authorized to take depositions, at a time and place of which he shall give the adverse party three (3) days' notice. If the affiant is not produced, his affidavit shall be suppressed. If the affiant is produced, he may be examined by either party. If on cross-examination the affidavit shall be shown to be false, then the provisional remedy shall be discharged.

History. Civil Code, § 601; Acts 1895, Pope's Dig., § 5212; A.S.A. 1947, § 28-No. 83, § 1, p. 111; C. & M. Dig., § 4201; 203.

CASE NOTES

Suppression.

It is only where the affidavit might be used as evidence that it can be suppressed, so that if an attachment is issued on an affidavit and the grounds of attachment are controverted, the affidavit can-

not be used as evidence and should not be suppressed because of plaintiff's failure to produce the affiant for cross-examination. *Churchill v. Hill*, 59 Ark. 54, 26 S.W. 378 (1894).

CHAPTER 46

DOCUMENTARY EVIDENCE GENERALLY

SUBCHAPTER.

1. GENERAL PROVISIONS.
2. PUBLIC RECORDS AS EVIDENCE GENERALLY.
3. HOSPITAL RECORDS ACT.

Publisher's Notes. Some provisions of this chapter may be superseded by the ARCP pursuant to the Supersession Rule

adopted by the Supreme Court of Arkansas in its order of December 18, 1978.

RESEARCH REFERENCES

Am. Jur. 29 Am. Jur. 2d, Evid., § 834 et seq.

C.J.S. 32 C.J.S., Evid., § 623 et seq.

SUBCHAPTER 1 — GENERAL PROVISIONS

SECTION.

16-46-101. Recordation of certain certified copies — Photographic copies of business and public records.

SECTION.

16-46-102. Writing filed with pleading read as genuine unless denied.
16-46-103. Surveys.

SECTION.

- 16-46-104. Investigations of attendance at places of public amusement.
- 16-46-105. Records of and testimony before committees reviewing and evaluating quality of medical or hospital care.

SECTION.

- 16-46-106. Access to medical records.
- 16-46-107. Identification of medical bills at trial.
- 16-46-108. Photographically reproduced records admissible in court.

Publisher's Notes. For comments regarding the Uniform Photographic Copies of Business and Public Records as Evidence Act, see Commentaries, Volume B.

Effective Dates. Acts 1953, No. 64, § 2: Feb. 13, 1953. Emergency clause provided: "It has been found that great difficulty and confusion exists in the application of rules of evidence respecting public and business records and that enactment of this law will greatly alleviate this situation and provide for more efficient administration of justice. Therefore, an emergency is hereby declared to exist and this Act being necessary for the immediate preservation of the public peace, health and safety, shall be in full force and effect from and after its passage and approval."

Acts 1957, No. 294, § 5: Mar. 27, 1957. Emergency clause provided: "Because the alleged results of blind checking are being used by those engaged in contracting film and other forms of amusement and entertainment upon a percentage rental basis to intimidate exhibitors to settle rental claims for an amount in excess of the amount shown by the books of said exhibitors in order to avoid threats of litigation and the resulting adverse publicity, and this Act being necessary for the preservation of the public peace, health, and safety, an emergency is hereby declared to exist, and this Act shall be in full force and effect from and after its passage and approval."

Acts 1977, No. 445, § 6: became law

without Governor's signature, Mar. 16, 1977. Emergency clause provided: "It is hereby found and declared by the General Assembly of the State of Arkansas that in order to insure candor, objectivity and the presentation of all pertinent information sought by committees reviewing the quality of medical and hospital care and thus contribute to the effective functioning of committees striving to determine and improve such care, an absolute privilege of confidentiality should be afforded to data elicited during the course of such inquiries and that the privilege of confidentiality should be provided for as soon as possible. Therefore, an emergency is hereby declared to exist, and this Act, being necessary for the immediate preservation of the public peace, health and safety, shall be in effect from the date of its passage and approval."

Acts 1995, No. 885, § 5: became law without Governor's signature. Noted Mar. 31, 1995. Emergency clause provided: "It is hereby found and determined by the Eightieth General Assembly that to protect the public and enhance patient care by allowing physicians to freely conduct peer review and quality review of medical and hospital care. Therefore, an emergency is hereby declared to exist and this act being necessary for the immediate preservation of the public peace, health and safety shall be in full force and effect from and after its passage and approval."

RESEARCH REFERENCES

ALR. Admissibility of computerized private business records. 7 ALR 4th 8.

Admissibility in evidence of professional directories. 7 ALR 4th 638.

16-46-101. Recordation of certain certified copies — Photographic copies of business and public records.

- (a)(1) The clerk of any court of record may record any certified copy

of any instrument by attaching the certified copy to his record book so as to make the copy be and become a part of the record to the extent that the copy cannot be detached, and the copy shall be legally recorded when the attachment has been made by the clerk. This subdivision shall apply to plats, blueprints, and photostatic copies only.

(2)(A) The county recorders, municipal clerks and recorders, clerks of courts of record, and any public officer whose duty it is to make public records are authorized to use and employ an approved system of photographic recording, photostatic recording, microfilm, microcard, miniature photographic recording, optical disc, electronic imaging, or other process which accurately reproduces or forms a durable medium for reproducing the original when provided with equipment necessary for such method of recording.

(B) When any document is recorded by the means prescribed by subdivision (a)(2)(A) of this section, the original may be destroyed unless the document is over fifty (50) years old and handwritten or its preservation is otherwise required by law.

(b)(1) If any business, institution, member of a profession or calling, or any department or agency of government, in the regular course of business or activity has kept or recorded any memorandum, writing, entry, print, representation, or combination thereof, of any act, transaction, occurrence, or event, and in the regular course of business has caused any or all of the same to be recorded, copied, or reproduced by any photographic, photostatic, microfilm, microcard, miniature photographic, optical disk, or other process which accurately reproduces or forms a durable medium for so reproducing the original, the original may be destroyed in the regular course of business unless its preservation is required by law.

(2) The reproduction, when satisfactorily identified, is as admissible in evidence as the original itself in any judicial or administrative proceeding whether the original is in existence or not.

(3) An enlargement or facsimile of the reproduction is likewise admissible in evidence if the original reproduction is in existence and available for inspection under direction of the court.

(4) The introduction of a reproduced record, enlargement, or facsimile does not preclude admission of the original.

History. Acts 1929, No. 189, § 5; Pope's Dig., § 5669; 1953, No. 64, § 1; 1963, No. 235, § 1; A.S.A. 1947, §§ 16-117, 28-932; Acts 1993, No. 1150, § 1; 1995, No. 454, § 1; 1995, No. 566, § 1; 1997, No. 636, § 1.

Publisher's Notes. For Comments regarding the Uniform Photographic Copies of Business and Public Records as Evidence Act, see Commentaries Volume B.

Amendments. The 1993 amendment inserted "optical disk" in (b)(1).

The 1995 amendment by No. 454 added (a)(2)(B); and inserted "photostatic record-

ing, microfilm, microcard, miniature photographic recording, optical disc, or other process which accurately reproduces or forms a durable medium for reproducing the original" in (a)(2)(A).

The 1995 amendment by No. 566 inserted "electronic imaging" in (b)(1).

The 1997 amendment inserted "municipal clerks and recorders" after "county recorders" in (a)(2)(A); and, in (a)(2)(B), inserted "the document is over fifty (50) years old and handwritten or" and inserted "otherwise."

Cross References. Reproduction of records, § 14-2-201 et seq.

RESEARCH REFERENCES

Ark. L. Rev. Photographic Copies of Business and Public Records as Evidence, 7 Ark. L. Rev. 332.

The Best Evidence Rule — A Rule Requiring the Production of a Writing to Prove the Writing's Contents, 14 Ark. L. Rev. 153.

Documentary Evidence — Arkansas, 15 Ark. L. Rev. 79.

Legislation — No. 235 — Photographic

Copies of Documents Held in a Custodial or Fiduciary Capacity Admissible as Evidence, 18 Ark. L. Rev. 125.

Contents of Writings, Recordings and Photographs, 27 Ark. L. Rev. 357.

UALR L.J. Sullivan, The Need for a Business or Payroll Records Affidavit for Use in Child Support Matters, 11 UALR L.J. 651.

CASE NOTES

ANALYSIS

Docket entries.
Foundation.

Docket Entries.

The docket entries of a justice of the peace are quasi-records and, when certified, are receivable in evidence. *Gates v. Bennett*, 33 Ark. 475 (1878).

Foundation.

There was no proper foundation made for the admission of a photostatic copy of a bill of lading, and under the best evidence

rule or under the statutes the copy cannot be introduced until a proper foundation is made. *Ebbert v. Hubbell Metals, Inc.*, 232 Ark. 971, 341 S.W.2d 768 (1961).

Where the microfilm copies of bank records were adequately identified by the bank's officer as being copies of records kept in the normal course of business, they were competent evidence. *Reed v. State*, 267 Ark. 1017, 593 S.W.2d 472 (Ct. App. 1980).

Cited: *Walker v. State*, 241 Ark. 300, 408 S.W.2d 905 (1966); *Simolin v. Wilson*, 253 Ark. 545, 487 S.W.2d 603 (1972).

16-46-102. Writing filed with pleading read as genuine unless denied.

Where a writing purporting to have been executed by one (1) of the parties is referred to in and filed with a pleading, it may be read as genuine against that party unless he denies its genuineness by affidavit before the trial is begun.

History. Civil Code, § 580; C. & M. Dig., § 4114; Pope's Dig., § 5123; A.S.A. 1947, § 28-927.

CASE NOTES

ANALYSIS

Purpose.
Affidavit.
Burden of proof.
Directed verdict.
Prima facie evidence.
Writing not filed.

Purpose.

The purpose of this section is to permit a party who files a written instrument with his pleadings to introduce it in evidence as genuine unless its genuineness is first denied under oath. *J.R. Watkins Medical Co. v. Montgomery*, 140 Ark. 487, 215 S.W. 638 (1919).

Affidavit.

The genuineness of the writing may be contested without filing the affidavits. *Saint Louis, I.M. & S. Ry. v. Smith*, 82 Ark. 105, 100 S.W. 884 (1907); *Hall v. T.M. Rea & Son*, 85 Ark. 269, 107 S.W. 1176 (1908); *Staggers v. White*, 121 Ark. 328, 181 S.W. 139 (1915).

Though defendant filed an affidavit denying the genuineness of the note before trial, claiming that the amount filled in was incorrect, the note was properly admitted in evidence where he admitted signing it. *Bailey v. Florsheim Bros. Dry Goods Co.*, 180 Ark. 293, 21 S.W.2d 171 (1929).

A note sued on was properly read in evidence where no affidavit was filed denying the genuineness of the signature. *Winfrey v. Moss*, 182 Ark. 525, 31 S.W.2d 956 (1930).

Burden of Proof.

Where, in a suit on a note or draft, its genuineness is denied by affidavit, the burden is on the plaintiff to prove the execution of the note or draft. *Ohio Galvanizing & Mfg. Co. v. Nichol*, 170 Ark. 16, 279 S.W. 377 (1926); *Ciscell v. Brazil*, 206 Ark. 1019, 178 S.W.2d 250 (1944); *United States v. Davis*, 125 F. Supp. 696 (W.D. Ark. 1954).

Where a defendant, sued on a note, relies on the defense that his signature as a joint maker is a forgery, the burden is his to show that fact where the note is filed as part of the original pleadings and is not denied before trial by answer or otherwise. *Terrill v. Fowler*, 175 Ark. 1010, 1 S.W.2d 75 (1928).

In a suit by a loan company to foreclose a mortgage, the canceled check bearing the mortgagor's endorsement was exhibited and the defendant denied that he received the money and alleged that their endorsement on the check or draft was a forgery, the burden was on the loan company to show that the mortgagors received the money. *Lavender v. Buhrman-Pharr Hdwe. Co.*, 177 Ark. 656, 7 S.W.2d 755 (1928).

Where defendant before trial files an affidavit denying the execution of the instrument sued on, the plaintiff must prove its execution; but even without filing the affidavit, the defendant may show that it is void because of fraud. *Harrell v. Southwest Mtg. Co.*, 180 Ark. 620, 22 S.W.2d 167 (1929).

In action against husband and wife on note allegedly executed by both, wife's affidavit, attached to answer, denying genuineness of signature, placed burden on holders to establish authenticity of her signature. *Wasson v. Patton*, 190 Ark. 397, 79 S.W.2d 276 (1935).

Failure to verify answer in foreclosure suit places upon defendant burden to prove she did not sign note and deed of trust and did not acknowledge the execution of the deed of trust. *Callaway v. Ashby*, 192 Ark. 929, 95 S.W.2d 907 (1936).

In action against husband and wife on note executed by husband and to foreclosure chattel mortgage also executed by him on an automobile in possession of his wife, wife, whose name did not appear on the note and mortgage, was not required to deny their genuineness by verified answer in order to prevent their being read in evidence against her. *Bryant v. Lewis*, 201 Ark. 288, 144 S.W.2d 37 (1940).

Directed Verdict.

Where defendant surety by affidavit denies the execution of the instrument sued on, and plaintiff offers no evidence on the issues so raised, it is proper to direct a verdict for defendant. *J.R. Watkins Medical Co. v. Warren*, 150 Ark. 542, 234 S.W. 618 (1921).

Prima Facie Evidence.

In an action on a promissory note, the note itself is prima facie evidence of its execution, in the absence of an affidavit by the purported maker denying the genuineness of his signature. *Heathcock v. Brooke*, 169 Ark. 73, 272 S.W. 843 (1925).

Mortgage, having been recorded, was admissible without proof of its execution, even though an affidavit of merit did not accompany the complaint. *Jones v. Nix*, 232 Ark. 182, 334 S.W.2d 891 (1960).

Writing Not Filed.

It was sufficient to invoke this section when the defendants answered plaintiff's request for admissions by denying execution under oath and alleging that the signatures to the note were forgeries when the note sued on was not attached to the complaint nor was defendants' answer verified. *United States v. Davis*, 125 F. Supp. 696 (W.D. Ark. 1954).

Cited: *Worthen Bank & Trust Co. v. Adair*, 15 Ark. App. 144, 690 S.W.2d 727 (1985).

16-46-103. Surveys.

No survey made by any person except the county surveyor or his deputy shall be considered as legal evidence in any court of law or equity within this state unless the surveys are made under authority of the United States or by the mutual consent of the parties.

History. Rev. Stat., ch. 40, § 18; C. & M. Dig., § 1901; Pope's Dig., § 2418; A.S.A. 1947, § 28-918.

CASE NOTES

ANALYSIS

Constitutionality.
Prima facie evidence.

Constitutionality.

This section, if literally construed, would be unconstitutional, but construed in connection with §§ 14-15-709, 14-15-710, and 14-15-712, it means that the certificate of any other surveyor than the county surveyor or his deputy shall not be admissible as documentary evidence of itself, without other proof. *Smith v. Leach*, 44 Ark. 287 (1884).

Prima Facie Evidence.

The only effect this section gives the county surveyor's certificate is to make it prima facie evidence of its correctness. *Jeffries v. Hargus*, 50 Ark. 65, 6 S.W. 328 (1887); *Hobbs v. Clark*, 53 Ark. 411, 14 S.W. 652 (1890).

The county surveyor's record of the survey made by him is only prima facie evidence of the correctness of the survey, and parol evidence of other surveys is admissible. *Walters v. Meador*, 211 Ark. 505, 201 S.W.2d 24 (1947).

16-46-104. Investigations of attendance at places of public amusement.

(a) No person employed as a private or confidential investigator shall undertake to determine the attendance or number of paid admissions at a public place of amusement and entertainment without first displaying to the owner or manager of such place his license or credentials as such investigator and receiving acknowledgment thereof in writing and filing a written and signed copy of such investigation and attendance record with the owner or manager immediately after the showing so checked and receiving acknowledgment thereof in writing.

(b) No evidence or testimony of any such investigator as to such admissions shall be admitted in any court in this state unless compliance with subsection (a) of this section is shown.

(c) Blind checking, also known as spot or random checking, of those attending public places of amusement and entertainment is declared to be against the public policy of the State of Arkansas, and any data, figures, or statistics compiled as a result of blind checking shall not be admitted as evidence in any case at law or equity.

History. Acts 1957, No. 294, §§ 1-3; A.S.A. 1947, §§ 28-714, 28-715.

16-46-105. Records of and testimony before committees reviewing and evaluating quality of medical or hospital care.

(a)(1)(A) The proceedings, minutes, records, or reports of organized committees of hospital medical staffs or medical review committees of local medical societies having the responsibility for reviewing and evaluating the quality of medical or hospital care, and any records, other than those records described in subsection (c) of this section, compiled or accumulated by the administrative staff of such hospitals in connection with such review or evaluation, together with all communications or reports originating in such committees, shall not be subject to discovery pursuant to the Arkansas Rules of Civil Procedure or the Freedom of Information Act of 1967, § 25-19-101 et seq., or admissible in any legal proceeding and shall be absolutely privileged communications.

(B) The submission of such proceedings, minutes, records, reports, and communications to a hospital governing board shall not operate as a waiver of the privilege.

(2) Neither shall testimony as to events occurring during the activities of such committees be subject to discovery pursuant to the Arkansas Rules of Civil Procedure or the Freedom of Information Act of 1967, § 25-19-101 et seq., or admissible.

(b)(1) Nothing in this section shall be construed to prevent disclosure of the data mentioned in subsection (a) of this section to appropriate state or federal regulatory agencies which by statute or regulation are entitled to access to such data, nor to organized committees of hospital medical staffs or governing boards where the medical practitioner seeks membership or clinical privileges.

(2) Further, nothing in this section shall be construed to prevent discovery and admissibility if the legal action in which such data is sought is brought by a medical practitioner who has been subjected to censure or disciplinary action by such agency or committee or by a hospital medical staff or governing board.

(c) Nothing in this section or § 20-9-308 shall be construed to apply to original hospital medical records, incident reports, or other records with respect to the care or treatment of any patient or to affect the discoverability or admissibility of such records.

History. Acts 1977, No. 445, §§ 1, 3; A.S.A. 1947, §§ 28-934, 28-935; Acts 1995, No. 885, § 1; 1999, No. 1536, § 8.

Amendments. The 1995 amendment added the subdivision designations in (a); inserted "pursuant to ... 25-19-101 et seq." in (a)(1) and (a)(2); and inserted "subject to discovery" in (a)(2).

The 1999 amendment, in (a)(1), inserted "other than those records described

in subsection (c) of this section" and added the last sentence; in (b), inserted the language "to organized ... shall be construed," inserted "agency or," and added the language following "committee" in (b)(2); in (c), deleted "kept" preceding "with respect," inserted "the care or treatment of," and deleted "in the course of business of operating a hospital" following "any patient"; and made stylistic changes.

RESEARCH REFERENCES

Ark. L. Rev. Watkins, Open Meetings Under the Arkansas Freedom of Information Act, 38 Ark. L. Rev. 268.

Watkins, Access to Public Records Under the Arkansas Freedom of Information Act, 38 Ark. L. Rev. 741.

CASE NOTES

ANALYSIS

- Disciplinary proceedings.
- Nonprivileged communications.
- Personnel records.
- Privileged communications.

Disciplinary Proceedings.

All records, documents and other information provided to the state medical board regarding revocation of the medical staff privileges of the defendant are absolutely privileged by Arkansas statutory provisions and cannot be discovered or admitted into evidence in a medical malpractice suit. *Hendrickson v. Leipzig*, 715 F. Supp. 1443 (E.D. Ark. 1989).

Nonprivileged Communications.

In a negligence action against doctors, hospital and nurses, the treating physician, who was a member of the hospital's pediatric committee, was allowed to testify as to his conversations with the manager and other hospital employees about the shortage of nurses. *National Bank of Commerce v. HCA Health Servs. of Midwest, Inc.*, 304 Ark. 55, 800 S.W.2d 694 (1990).

Medication incident report was discoverable under subsection (c) because report was not prepared by or at the direction of any organized committee for committee purposes, rather, policy and procedures of hospital required such a report to be generated any time there was a variance between physician's orders with respect to administration of medication and actual administration of medication; medical incident reports were designed to contain contemporaneous statements. *Cochran v.*

St. Paul Fire & Marine Ins. Co., 909 F. Supp. 641 (W.D. Ark. 1995).

Personnel Records.

Response to reprimand was not a medical record, incident report, or other record kept with respect to any patient within the meaning of the language and intent of subsection (c), but instead was a record filed with the administrative staff which became a part of a disciplinary action kept with respect to one of hospital's personnel. *HCA Health Servs. of Midwest, Inc. v. National Bank of Commerce*, 294 Ark. 525, 745 S.W.2d 120 (1988).

Privileged Communications.

Trial court should have excluded nurse's written response as privileged communication as proscribed pursuant to subsection (a). *HCA Health Servs. of Midwest, Inc. v. National Bank of Commerce*, 294 Ark. 525, 745 S.W.2d 120 (1988).

Records of a post-incident disciplinary proceeding were within the privilege of subsection (a). *National Bank of Commerce v. HCA Health Servs. of Midwest, Inc.*, 304 Ark. 55, 800 S.W.2d 694 (1990).

Hospital statements taken from witnesses as part of a quality assurance or peer review proceeding were excluded from disclosure and were absolutely privileged communications pursuant to Arkansas statutes. *Berry v. Saline Mem. Hosp.*, 322 Ark. 182, 907 S.W.2d 736 (1995).

Cited: *Baxter County Newspapers, Inc. v. Medical Staff of Baxter Gen. Hosp.*, 273 Ark. 511, 622 S.W.2d 495 (1981); *Saline Mem. Hosp. v. Berry*, 321 Ark. 588, 906 S.W.2d 297 (1995).

16-46-106. Access to medical records.

(a)(1) In contemplation of, preparation for, or use in any legal proceeding, any person who is or has been a patient of a doctor, hospital, ambulance provider, medical health care provider, or other medical institution shall be entitled to obtain access, personally or by and through his or her attorney, to the information in his or her medical records, upon request and with written patient authorization, and shall

be furnished copies of all medical records pertaining to his or her case upon the tender of the expense of such copy or copies.

(2) Cost of each photocopy, excluding X rays, shall not exceed one dollar (\$1.00) per page for the first five (5) pages and twenty-five cents (.25¢) for each additional page, except that the minimum charge shall be five dollars (\$5.00).

(3) Provided, however, a reasonable retrieval fee for stored records of a hospital or an ambulance provider may be added to the photocopy charges.

(4) Provided, further, this section shall not prohibit reasonable fees for narrative medical reports or medical review when performed by the doctor or medical institution subject to the request.

(b)(1) If a doctor believes a patient should be denied access to his or her medical records for any reason, the doctor must provide the patient or the patient's guardian or attorney a written determination that disclosure of such information would be detrimental to the individual's health or well-being.

(2)(A) At such time, the patient or the patient's guardian or attorney may select another doctor in the same type practice as the doctor subject to the request to review such information and determine if disclosure of such information would be detrimental to the patient's health or well-being.

(B) If the second doctor determines, based upon professional judgment, that disclosure of such information would not be detrimental to the health or well-being of the individual, the medical records shall be released to the patient or the patient's guardian or attorney.

(3) If the determination is that disclosure of such information would be detrimental, then it either will not be released or the objectionable material will be obscured before release.

(4) The cost of this review of the patient's record will be borne by the patient or the patient's guardian or attorney.

(c) Nothing in this section shall preclude the existing subpoena process; however, if a patient is compelled to use the subpoena process in order to obtain access to, or copies of, their own medical records after reasonable requests have been made and a reasonable time has expired, then the court issuing the subpoena and having jurisdiction over the proceedings shall grant the patient a reasonable attorney's fee plus costs of court against the doctor, hospital, or medical institution.

(d) This section does not apply to the Department of Correction.

History. Acts 1991, No. 767, §§ 1, 2; 1995, No. 708, § 1; 1999, No. 333, §§ 1, 2.

Amendments. The 1995 amendment added the language beginning "however" in (c).

The 1999 amendment inserted "medical health care provider" following "ambulance provider" in (a)(1); and inserted "or an ambulance provider" following "records of a hospital" in (a)(3).

16-46-107. Identification of medical bills at trial.

(a) Upon the trial of any civil case involving injury, disease, or disability, the patient, a member of his family, or any other person responsible for the care of the patient shall be a competent witness to identify doctor bills, hospital bills, ambulance service bills, drug bills, and similar bills for expenses incurred in the treatment of the patient upon a showing by the witness that such bills were received from a licensed practicing physician, hospital, ambulance service, pharmacy, drug store, or supplier of therapeutic or orthopedic devices, and that such expenses were incurred in connection with the treatment of the injury, disease, or disability involved in the subject of litigation at trial.

(b) Such items of evidence need not be identified by the person who submits the bill, and it shall not be necessary for an expert witness to testify that the charges were reasonable and necessary.

History. Acts 1993, No. 424, § 1.

RESEARCH REFERENCES

UALR L.J. Legislative Survey, Evidence, 16 UALR L.J. 127.

16-46-108. Photographically reproduced records admissible in court.

(a)(1) Any record or set of records or photographically reproduced copies of such records which would be admissible under Rule 803(6) or (7) of the Arkansas Rules of Evidence shall be admissible in evidence in any court in this state upon the affidavit of the person who would otherwise provide the prerequisites of Rule 803(6) or (7) that such records attached to such affidavit were in fact so kept as required by Rule 803(6) or (7), provided, further, that such record or records, along with such affidavit, are filed with the clerk of the court for inclusion with the papers in the cause in which the record or records are sought to be used as evidence at least fourteen (14) days prior to the day upon which the trial of said cause commences, and provided the other parties to said cause are given prompt notice by the party filing same of the filing of such record or records and affidavit, which notice shall identify the name and employer, if any, of the person making the affidavit, and such records shall be made available to the counsel for other parties to the action or litigation for inspection and copying.

(2) The expense for copying shall be borne by the party, parties, or persons who desire copies and not by the party or parties who file the records and serve notice of said filing in compliance with this rule.

(3) Notice shall be deemed to have been promptly given if it is served in the manner contemplated by Rule 27(a)(2) of the Arkansas Rules of Civil Procedure fourteen (14) days prior to commencement of the trial in said cause.

(b) A form for the affidavit of such person as shall make such affidavit as is permitted in subsection (a) of this section shall be sufficient if it follows this form, though this form shall not be exclusive, and an affidavit which substantially complies with the provisions of this rule shall suffice, to wit:

No.

John Doe (Name of Plaintiff)) IN THE COURT OF
v.) COUNTY,
John Roe (Name of Defendant)) Arkansas

AFFIDAVIT

Before me, the undersigned authority, personally appeared, who, being by me duly sworn, deposed as follows:

My name is, I am of sound mind, capable of making this affidavit, and personally acquainted with the facts herein stated:

I am the custodian of the records of Attached hereto are pages of records from These said pages of records are kept by in the regular course of business, and it was the regular course of business of for an employee or representative of, with knowledge of the act, event, condition, opinion, or diagnosis, recorded to make the record or to transmit information thereof to be included in such record; and the record was made at or near the time or reasonably soon thereafter. The records attached hereto are the original or exact duplicates of the original.

.....
Affiant

SWORN TO AND SUBSCRIBED before me on the day of 19... .

.....
My commission expires:
.....

.....
Notary Public, State of Arkansas
.....
Notary's printed name

History. Acts 1995, No. 1136, § 1.

CASE NOTES

Prejudice or Confusion.

The fact that medical records fell within § 16-46-108 and Evid. Rule 803(6) did not equate to automatic admissibility, and the

trial court properly excluded such evidence to prevent possible prejudice or confusion. Lovell v. Beavers, 336 Ark. 551, 987 S.W.2d 660 (1999).

SUBCHAPTER 2 — PUBLIC RECORDS AS EVIDENCE GENERALLY

SECTION.

- 16-46-201. Statute books as evidence of private acts.
- 16-46-202. Statute books of other jurisdictions as evidence of legislative acts.
- 16-46-203. Official documents of cities and towns.
- 16-46-204. [Repealed.]
- 16-46-205. Copies of records of Auditor of State or Treasurer of State.
- 16-46-206. Copies of public officers — Copies of bonds given in judicial proceedings and probate matters.
- 16-46-207. Copies of public contracts.

SECTION.

- 16-46-208. Production of original bond or contract upon denial of execution.
- 16-46-209. Certified copies of land entries.
- 16-46-210. Copies of records relating to disposition of state lands.
- 16-46-211. Notary's protest.
- 16-46-212. Authenticated copies or transcripts of federal documents.
- 16-46-213. Records of Interstate Commerce Commission and Arkansas State Highway and Transportation Department.

Cross References. Uniform Interstate and International Procedure Act, § 16-4-101 et seq.

Effective Dates. Acts 1853, § 4, p. 199: effective on passage.

Acts 1949, No. 293, § 6: approved Mar. 19, 1949. Emergency clause provided: "Due to the fact that litigants in the courts of this State are unable to make use of books of account and copies of the records of the agencies and departments of the United States and by reason thereof are compelled to expend huge sums and are denied the right of a speedy and economical disposition of their business in the courts of this State, an emergency is hereby declared to exist, and this Act being also necessary for the immediate preservation of the public peace, health and safety, the same shall take effect and

be in full force and effect from and after its passage."

Acts 1975, No. 285, § 4: Mar. 3, 1975. Emergency clause provided: "It has been found and it is hereby declared that uncertainty as to the admissibility in evidence of copies of schedules, classifications, and tariffs as provided for in this Act has resulted in delays and inefficiencies in the administration of judicial proceedings in the courts of this state and that it is essential to the welfare of this state and her inhabitants that these delays and inefficiencies be remedied. Therefore, this Act being necessary for the preservation of the public peace, health and safety, an emergency is declared to exist and this Act shall be in full force and effect immediately upon its passage and approval."

RESEARCH REFERENCES

ALR. Admissibility in state court proceedings of police reports, 31 ALR 4th 913.

Ark. L. Rev. Documentary Evidence — Arkansas, 15 Ark. L. Rev. 79.

16-46-201. Statute books as evidence of private acts.

The printed statute books of this state shall be evidence of the private acts contained therein.

History. Rev. Stat., ch. 59, § 1; C. & M. Dig., § 4115; Pope's Dig., § 5124; A.S.A. 1947, § 28-901.

CASE NOTES

ANALYSIS

Legislative journals.
Other proof.

Legislative Journals.

The courts may look to the legislative journals to see if an act was constitutionally passed. *Webster v. Little Rock*, 44 Ark. 536 (1884).

Other Proof.

The method prescribed by this section is not the exclusive method of proving private acts. *Carroll County v. Reeves Constr. Co.*, 154 Ark. 434, 242 S.W. 821 (1922).

16-46-202. Statute books of other jurisdictions as evidence of legislative acts.

(a) The printed statute books of the several states and territories of the United States, purporting to have been printed under the authority of the states or territories, shall be evidence of the legislative acts of such states or territories.

(b) Copies of any act, law, or resolution contained in the printed statute books of any of the states and territories of the United States and purporting to have been printed by authority of the state or territory, and which are or may be deposited in the office of the Secretary of State and required by law to be kept there, certified under the seal of the Secretary of State, shall be admitted as evidence.

History. Rev. Stat., ch. 59, §§ 2, 3; C. & M. Dig., §§ 4116, 4117; Pope's Dig., §§ 5125, 5126; A.S.A. 1947, §§ 28-902, 28-903.

Cross References. Judicial knowledge of laws of other states, § 16-40-104.

CASE NOTES

Additional Proof.

The printed statute books of sister states, purporting to be published by authority, are admissible as evidence in the courts of this state without further proof of authenticity. *Clark v. Bank of Mississippi*, 10 Ark. 516 (1850); *May v. Jameson*,

11 Ark. 368 (1850); *Johnson v. Cocks*, 12 Ark. 672 (1852); *McNeill v. Arnold*, 17 Ark. 154 (1856); *Union Cent. Life Ins. Co. v. Caldwell*, 68 Ark. 505, 58 S.W. 355 (1900); *Saint Louis, I.M. & S. Ry. v. Stewart*, 68 Ark. 606, 61 S.W. 169 (1901); *Lanigan v. North*, 69 Ark. 62, 63 S.W. 62 (1901).

16-46-203. Official documents of cities and towns.

Printed copies of the ordinances, resolutions, orders, and bylaws of any city or incorporated town in this state which are published by the authority of the city or incorporated town, and manuscript copies of these things, certified under the hand of the proper officer and having the corporate seal of such city or town attached thereto, shall be received as evidence.

History. Rev. Stat., ch. 59, § 10; C. & M. Dig., § 4129; Pope's Dig., § 5138; A.S.A. 1947, § 28-904.

Cross References. Bylaws or ordinances of municipalities admissible by printed or certified copy, § 14-55-402.

CASE NOTES

ANALYSIS

Parol evidence.

Prima facie evidence.

Parol Evidence.

An ordinance may not be proved by parol evidence. *Dechard v. Drewry*, 64 Ark. 599, 44 S.W. 351 (1897); *Hencke v. Standiford*, 66 Ark. 535, 52 S.W. 1 (1899).

Prima Facie Evidence.

A printed copy of an ordinance is prima facie evidence of its existence, and the burden is on defendant to overcome it. *Van Buren v. Wells*, 53 Ark. 368, 14 S.W. 38 (1890); *Arkadelphia Lumber Co. v. City*

of Arkadelphia, 56 Ark. 370, 19 S.W. 1053 (1892); *Heno v. City of Fayetteville*, 90 Ark. 292, 119 S.W. 287 (1909); *Malvern v. Cooper*, 108 Ark. 24, 156 S.W. 845 (1913).

Where the record containing city ordinances is produced containing a record of a certain ordinance, in the passage of which it is required that a majority of the members elected to the council shall concur, such record is prima facie evidence that the ordinance was duly passed so that the burden of attacking it is on the party contending that it was passed. *Arkansas Light & Power Co. v. Paragould*, 146 Ark. 1, 225 S.W. 435 (1920).

16-46-204. [Repealed.]

Publisher's Notes. This section, concerning copies of proceedings before a justice of the peace as evidence, was repealed by Acts 1999, No. 19, § 1. The section was

derived from Rev. Stat., ch. 59, §§ 4, 5; C. & M. Dig., §§ 4118, 4119; Pope's Dig., §§ 5127, 5128; A.S.A. 1947, §§ 28-905, 28-906.

16-46-205. Copies of records of Auditor of State or Treasurer of State.

(a) Copies of all papers and documents legally deposited in the office of the Auditor of State or the office of the Treasurer of State, when certified by the officer and authenticated by his seal of office, shall be received in evidence in the same manner and with the same effect as the originals.

(b) Any extract or entry from lists, books, or tax books relative to lands sold or forfeited at collectors' sales or any of the records of the office of the Auditor of State properly certified by the Auditor of State shall be received in any court in evidence, in the same manner as if a copy of the entire list, book, tax book, or other record had been produced.

(c) Where a debt due to the state appears upon the books of the Auditor of State or of any other public officer whose duty it shall be to audit and keep an accurate account of such debt, a copy of the balance due upon the books of the Auditor of State or officer, certified by him to be a correct and true balance, shall be sufficient evidence of such indebtedness.

History. Rev. Stat., ch. 18, § 6; Acts 1853, § 2, p. 199; Civil Code, § 487; C. & M. Dig., §§ 4122, 4123, 4128; Pope's Dig.,

§§ 5131, 5132, 5137; A.S.A. 1947, §§ 28-908 — 28-910.

CASE NOTES

ANALYSIS

Competency of inspectors.
Prima facie evidence.

Competency of Inspectors.

It was competent for witnesses who had, in an official capacity, inspected the accounts of the Treasurer of State in his dealings with the state and made written reports of their investigations to testify as to a general balance of his accounts with the state. *Woodruff v. State*, 61 Ark. 157, 32 S.W. 102 (1895).

Prima Facie Evidence.

In an action on the official bond of the Treasurer of State, a copy of his accounts from the auditor's books, properly certified, is prima facie evidence of the state of his accounts; and the jury should be instructed not to go into accounts, but to take the balance certified by the auditor, unless the accuracy of the items is impeached. *State v. Newton*, 33 Ark. 276 (1878).

16-46-206. Copies of public officers — Copies of bonds given in judicial proceedings and probate matters.

(a) Copies of all bonds required by law to be given by sheriffs, collectors, state and county treasurers, the Clerk of the Supreme Court and clerks of circuit courts, and all officers of or under the state who are required by law to give bond for the faithful performance of their duties, duly certified under the seal of office of the officer in whose custody the bonds are required by law to be kept, shall be received as evidence to the same extent as the originals.

(b) Copies of all bonds required by law to be given by executors, administrators, guardians, and commissioners for the faithful performance of their duties as such, and the bonds of principal and security, required to be taken in the course of any judicial proceedings in any of the courts of this state, duly certified and attested, under the seal of office of the officer to whom by law the custody of the bonds is committed, shall be evidence to the same extent as the originals.

History. Rev. Stat., ch. 59, §§ 11, 13; §§ 5139, 5141; A.S.A. 1947, §§ 28-912, C. & M. Dig., §§ 4130, 4132; Pope's Dig., 28-913.

16-46-207. Copies of public contracts.

Copies of contracts entered into by individuals with the state or any officer thereof, or with any county or with any person for the benefit of any county, under or by the authority of any law or the lawful order of any court, in the custody of any officer, duly certified and attested, under the official seal of the officer, or if the officer has no official seal, then verified by his affidavit, shall be allowed as evidence to the same extent as the original.

History. Rev. Stat., ch. 59, § 12; C. & M. Dig., § 4131; Pope's Dig., § 5140; A.S.A. 1947, § 28-914.

CASE NOTES

Cited: Smith v. Ford, 203 Ark. 265, 157 S.W.2d 199 (1941).

16-46-208. Production of original bond or contract upon denial of execution.

When suit shall be brought on any copy of a bond, contract, or writing mentioned in § 16-46-206 or § 16-46-207 and the defendant shall, by his answer under oath, deny the execution of the instrument, the court may require the production of the original bond or writing if necessary to the attainment of justice.

History. Rev. Stat., ch. 59, § 14; C. & M. Dig., § 4133; Pope's Dig., § 5142; A.S.A. 1947, § 28-915.

16-46-209. Certified copies of land entries.

Copies of entries made in the books of any land office of this state, or papers filed therein, certified by the register or receiver, shall be evidence to the same extent as the original books or papers would be if produced.

History. Rev. Stat., ch. 59, § 6; C. & M. Dig., § 4120; Pope's Dig., § 5129; A.S.A. 1947, § 28-916.

CASE NOTES

ANALYSIS

In general.
Lost records.
Sufficiency of certificate.

In General.

A certified copy of the original record is of equal dignity as evidence as the originals. Dawson v. Parham, 55 Ark. 286, 18 S.W. 48 (1892).

Lost Records.

In a case where the deed to land had been lost and the records of the land office

had been destroyed by fire, testimony of the former county surveyor and sheriff that a particular party had exercised ownership and was generally understood to be the owner was sufficient evidence to sustain a verdict. Steward v. Scott, 57 Ark. 153, 20 S.W. 1088 (1893).

Sufficiency of Certificate.

A certificate of what the record contains is not sufficient; a copy of the record duly authenticated is required. Driver v. Evans, 47 Ark. 297, 1 S.W. 518 (1886).

16-46-210. Copies of records relating to disposition of state lands.

All certified transcripts from the office of the Auditor of State and all certified transcripts from the office of the Commissioner of State Lands shall be received in evidence of the existence of the records of which the transcript is a copy, without further authenticity, in all matters pending in any of the courts of this state.

History. Acts 1853, § 24, p. 161; C. & M. Dig., § 4127; Pope's Dig., § 5136; A.S.A. 1947, § 28-917.

Cross References. Certificate of Sec-

retary of State as to state ownership of lands, § 15-32-310.

Deeds executed by Commissioner of State Lands, § 22-6-108.

CASE NOTES

ANALYSIS

Foundation.
Sufficiency of certificate.

Foundation.

A certified transcript of the record of the Commissioner of State Lands is admissible to show that the state deeded certain land to a person named only after a proper foundation has been laid for the introduction of secondary evidence. *Boynton v. Ashabranner*, 75 Ark. 415, 88 S.W. 566, 91 S.W. 20 (1905).

A commissioner's transcript is not admissible until the party offering it shows

that the deed cannot be produced. *Carpenter v. Dressler*, 76 Ark. 400, 89 S.W. 89 (1905).

Sufficiency of Certificate.

The purchase of swamp land from the state can only be proved by the certificate or deed of purchase, or, in their absence, by a certified transcript of the records and official documents of the proper land office. The certificate of the State Land Commissioner of what the records in his office show is not admissible. *Driver v. Evans*, 47 Ark. 297, 1 S.W. 518 (1886).

16-46-211. Notary's protest.

(a) The protest made by a notary public under his hand and seal of office shall be evidence of the facts contained in the protest.

(b) The certificate of a notary public, under his hand and seal of office, that he forwarded notice of protest shall be prima facie evidence of the fact stated in the certificate.

History. Rev. Stat., ch. 20, § 11; Acts 1859, No. 234, § 1, p. 300; C. & M. Dig., §§ 4125, 4126; Pope's Dig., §§ 5134, 5135; A.S.A. 1947, §§ 28-922, 28-923.

Cross References. Declarations, protests, and acknowledgments taken by notary admissible as evidence of facts, § 21-14-110.

CASE NOTES

Foreign Notary.

A certificate of protest of a note by a notary of another state attested by his seal is prima facie evidence that the acts indicated were done by him. *Fletcher v.*

Arkansas Nat'l Bank, 62 Ark. 265, 35 S.W. 228 (1896).

Cited: *Peters v. Hobbs*, 25 Ark. 67 (1867).

16-46-212. Authenticated copies or transcripts of federal documents.

Properly authenticated copies or transcripts of books, records, reports, minutes of proceedings, and other documents, or any part thereof or excerpts therefrom, of any department or agency of the United States kept, made, or maintained in the performance of duties prescribed by law shall be admitted in evidence in the courts of this state equally with the originals thereof.

History. Acts 1949, No. 293, § 4;
A.S.A. 1947, § 28-931.

16-46-213. Records of Interstate Commerce Commission and Arkansas State Highway and Transportation Department.

Printed copies of schedules, classifications, and tariffs of rates, fares, and charges, and supplements thereto, of all common carriers and contract carriers by railroad, motor vehicle, or otherwise, filed with the Interstate Commerce Commission or the Arkansas State Highway and Transportation Department and which reflect thereon an Interstate Commerce Commission number and an effective date, or which reflect thereon an Arkansas State Highway and Transportation Department number and an effective date, may be received in evidence in any proceeding before the courts or administrative agencies of this state, without certification or authentication, and shall be presumed to be correct copies of the original schedules, classifications, tariffs, and supplements on file with the Interstate Commerce Commission or on file with the Arkansas State Highway and Transportation Department.

History. Acts 1975, No. 285, § 1;
A.S.A. 1947, § 28-933.

SUBCHAPTER 3 — HOSPITAL RECORDS ACT

SECTION.

- 16-46-301. Definitions.
- 16-46-302. Furnishing copies of records in compliance with subpoenas.
- 16-46-303. Sealing, identification, and direction of copies.
- 16-46-304. Opening of sealed envelopes.
- 16-46-305. Affidavit of custodian as to copies — Charges.

SECTION.

- 16-46-306. Admissibility of copies and affidavits.
- 16-46-307. Personal attendance of custodian — Production of original record.
- 16-46-308. Substitution of copies for original records.

Effective Dates. Acts 1981, No. 255, § 10: Feb. 27, 1981. Emergency clause provided: "It is hereby found and determined by the General Assembly that presently custodians of hospital records must appear personally in court to verify such records resulting in the waste of a large amount of time of hospital personnel with a resulting increase in cost of medical care; that medical records custodians

should be allowed to certify their records for the court and not appear personally in court to verify the same; and that this Act is immediately necessary to so provide. Therefore, an emergency is hereby declared to exist and this Act being immediately necessary for the preservation of the public peace, health and safety shall be in full force and effect from and after its passage and approval."

RESEARCH REFERENCES

ALR. Admissibility of computerized private business records. 7 ALR 4th 8.

Physician-patient privilege as extending to patient's medical or hospital records. 10 ALR 4th 552.

Ark. L. Notes. Gitelman and Watkins, No Requiem for Ricarte: Separation of Powers, the Rules of Evidence, and the Rules of Civil Procedure, 1991 Ark. L. Notes 27.

16-46-301. Definitions.

As used in this subchapter, unless the context otherwise requires:

(1) "Custodian" means the medical records librarian and the administrator or other chief officer of a duly licensed hospital or comprehensive community mental health center in this state and its proprietor, as well as his deputies and assistants, and any other persons who are official custodians or depositories of records; and

(2)(A) "Records" means hospital records or medical records and includes an admitting form, discharge summary, history and physical, progress notes, physicians' orders, reports of operations, recovery room records, lab reports, consultation reports, medication records, nurses' notes, and other reports catalogued and maintained by the hospital's medical record department.

(B) However, "records" shall not mean and include X rays, electrocardiograms, and similar graphic matter.

History. Acts 1981, No. 255, § 1; A.S.A. 1947, § 28-936; Acts 1993, No. 274, § 1.

Amendments. The 1993 amendment redesignated former (1) as (2) and (2) as (1); redesignated the two sentences of

present (2) as (2)(A) and (B); in (1), inserted "or comprehensive community mental health center" and substituted "his deputies" for "their deputies"; and made stylistic changes.

16-46-302. Furnishing copies of records in compliance with subpoenas.

Except as hereinafter provided, when a subpoena duces tecum is served upon a custodian of records of any hospital duly licensed under the laws of this state in an action or proceeding in which the hospital is neither a party nor the place where any cause of action is alleged to have arisen and such a subpoena requires the production of all or any part of the records of the hospital related to the care or treatment of a patient in the hospital, then it shall be sufficient compliance therewith if the custodian delivers, by hand or by registered mail to the court clerk or the officer, court reporter, body, or tribunal issuing the subpoena or conducting the hearing, a true and correct copy of all records described in the subpoena together with the affidavit described in § 16-46-305. However, a subpoena duces tecum for records shall not be deemed to include X rays, electrocardiograms, and similar graphic matter unless they are specifically referred to in the subpoena.

History. Acts 1981, No. 255, § 2; A.S.A. 1947, § 28-937.

Cross References. Subpoena for pro-

duction of documentary evidence, ARCP 45.

CASE NOTES

Admissibility.

Where the custodian of hospital X rays attached an affidavit to the X rays and hospital records stating that the records were authentic, the trial court did not err in allowing the state medical examiner to

use the X rays in order to prove the identity of the murder victim. *Surrridge v. State*, 279 Ark. 183, 650 S.W.2d 561 (1983).

Cited: *Mosley v. State*, 22 Ark. App. 29, 732 S.W.2d 861 (1987).

16-46-303. Sealing, identification, and direction of copies.

The copy of the records shall be separately enclosed in an inner envelope or wrapper, sealed, with the title and number of the action, the name of the custodian, and the date of subpoena clearly inscribed thereon. The sealed envelope or wrapper shall then be enclosed in an outer envelope or wrapper, sealed, and directed as follows:

(1) If the subpoena directs attendance in court, to the clerk or the judge of the court;

(2) If the subpoena directs attendance at a deposition, to the officer before whom the deposition is to be taken, at the place designated in the subpoena for the taking of the deposition or at his place of business;

(3) In other cases, to the officer, body, or tribunal conducting the hearing, at a like address.

History. Acts 1981, No. 255, § 3; A.S.A. 1947, § 28-938.

CASE NOTES

Cited: *Mosley v. State*, 22 Ark. App. 29, 732 S.W.2d 861 (1987).

16-46-304. Opening of sealed envelopes.

(a) Unless the sealed envelope or wrapper is returned to the custodian who is to appear personally, the copy of the records shall remain sealed and shall be opened only at the time of trial, deposition, or other hearing, upon the direction of the judge, court, officer, body, or tribunal conducting the proceeding, in the presence of all parties who have appeared in person or by counsel at such trial, deposition, or hearing. Before directing that the inner envelope or wrapper be opened, the judge, court, officer, body, or tribunal shall first ascertain that either:

(1) The records have been subpoenaed at the instance of the patient involved or his counsel of record; or

(2) The patient involved or someone authorized in his behalf to do so for him has consented thereto and waived any privilege of confidentiality involved.

(b) Records which are not introduced in evidence or required as part of the record shall be returned to the person or entity from whom received.

History. Acts 1981, No. 255, § 4;
A.S.A. 1947, § 28-939.

CASE NOTES

ANALYSIS

Construction.
Blood tests.
Noncompliance.

Construction.

The legislature designed this section to be in accord with the other "physician privilege" statute, Evid. Rule 503, by limiting the privilege to confidential communications. *McVay v. State*, 312 Ark. 73, 847 S.W.2d 28 (1993).

Blood tests.

The results of blood tests are not con-

sidered to be confidential information and therefore it is proper to admit them. *McVay v. State*, 312 Ark. 73, 847 S.W.2d 28 (1993).

Noncompliance.

Blood alcohol report was introduced into evidence without compliance with this section where there was no indication whatsoever that the report was sealed in an inner envelope which was also sealed in an outer envelope. *Mosley v. State*, 22 Ark. App. 29, 732 S.W.2d 861 (1987).

16-46-305. Affidavit of custodian as to copies — Charges.

(a) The records shall be accompanied by an affidavit of a custodian stating in substance:

(1) That the affiant is the duly authorized custodian of the records and has authority to certify the records;

(2) That the copy is a true copy of all the records described in the subpoena; and

(3) That the records were prepared by personnel of the hospital, staff physicians, or persons acting under the control of either, in the ordinary course of the hospital's business at or near the time of the act, condition, or event reported therein.

(b) If the hospital has none of the records described, or only part of them, the custodian shall state so in the affidavit and file the affidavit and any records as are available in the manner described in §§ 16-46-302 and 16-46-303.

(c) The custodian of the records may enclose a statement of costs for copying the records, and the costs of copying the records shall be borne by the party requesting the subpoena duces tecum for the records.

History. Acts 1981, No. 255, § 5;
A.S.A. 1947, § 28-940.

16-46-306. Admissibility of copies and affidavits.

The copy of the record shall be admissible in evidence to the same extent as though the original record was offered and the custodian had been present and testified to the matters stated in the affidavit.

History. Acts 1981, No. 255, § 6;
A.S.A. 1947, § 28-941.

16-46-307. Personal attendance of custodian — Production of original record.

(a) Where the personal attendance of the custodian is desired, the subpoena duces tecum shall contain a clause which reads: "The personal attendance of the custodian of records is necessary."

(b) Where both the personal attendance of the custodian and the production of the original record are desired, the subpoena duces tecum shall contain a clause which reads: "The original records and the personal attendance of the custodian of records are necessary."

(c) Where the personal attendance of the custodian is requested, the reasonable cost of producing the records and expenses for personal attendance shall be borne by the party requesting the subpoena.

History. Acts 1981, No. 255, § 7;
A.S.A. 1947, § 28-942.

16-46-308. Substitution of copies for original records.

In view of the property right of the hospital in its records, original records may be withdrawn after introduction into evidence and copies substituted unless otherwise directed by the court, judge, officer, body, or tribunal conducting the hearing. The custodian may prepare copies of original records in advance of testifying for the purpose of making substitution of the original record, and the reasonable charges for making the copies shall be borne by the party requesting the subpoena. If copies are not prepared in advance, they can be made and substituted at any time after introduction of the original record, and the reasonable charges for making the copies shall be borne by the party requesting the subpoena.

History. Acts 1981, No. 255, § 8;
A.S.A. 1947, § 28-943.

CHAPTER 47**ACKNOWLEDGMENT AND PROOF OF INSTRUMENTS****SUBCHAPTER.**

1. GENERAL PROVISIONS.
2. UNIFORM ACKNOWLEDGMENT ACT.

RESEARCH REFERENCES

Am. Jur. 1 Am. Jur. 2d, Acknowl., § 1 et seq. **C.J.S.** 1A C.J.S., Acknowl., § 1 et seq.

SUBCHAPTER 1 — GENERAL PROVISIONS

SECTION.

- 16-47-101. Proof or acknowledgment as prerequisite to recording real estate conveyances.
- 16-47-102. Forms of acknowledgments — Validity — Acknowledgments of married persons.
- 16-47-103. Officers authorized to take proof or acknowledgment of real estate conveyances.
- 16-47-104. Attestation of acknowledgments.
- 16-47-105. Certificate of acknowledgment.
- 16-47-106. Manner of making acknowl-

SECTION.

- edgment — Proof of deed or instrument — Proof of identity of grantor or witness.
- 16-47-107. Acknowledgment by corporations.
- 16-47-108. Validation of instruments affecting title to property.
- 16-47-109. Validation of acknowledgments of personnel of armed forces.
- 16-47-110. Recorded deed or written instrument affecting real estate.

Effective Dates. Acts 1875, No. 13, § 3: effective on passage.

Acts 1887, No. 91, § 2: effective on passage.

Acts 1899, No. 150, § 3: effective on passage.

Acts 1919, No. 45, § 3: effective on passage. Emergency declared. Approved Feb. 4, 1919.

Acts 1921, No. 233, § 2: effective on passage.

Acts 1923, No. 464, § 3: effective on passage.

Acts 1945, No. 263, § 3: Mar. 20, 1945. Emergency clause provided: "That due to the fact that a number of our citizens are far away from home and are out of the state and nation and have no opportunity to appear before some state officer for the purpose of having their signature acknowledged, and that a number of citizens of the State of Arkansas are in the armed forces and have been required and forced by law to sign various papers that should be properly acknowledged, it is hereby declared that an emergency exists and this act being necessary for the immediate preservation of the public peace, health and safety, this act shall take effect and be in full force and effect from and after its passage and approval."

Acts 1955, No. 101, § 5: Feb. 23, 1955. Emergency clause provided: "The General Assembly finds it to be a fact, and so declares, that many instruments contain defective acknowledgments due to errors in the preparation thereof, without fault upon the part of the person, firm or corporation so executing said instruments; that these defective acknowledgments hamper the sale of real estate throughout the State and retard the development of industries and other businesses in the State of Arkansas; that this Act being necessary for the immediate preservation of the public peace, health and safety, an emergency is hereby declared to exist and this Act shall be in full force and effect from and after its passage and approval."

Acts 1981, No. 714, § 75: Mar. 25, 1981. Emergency clause provided: "It has been found and is declared by the General Assembly of Arkansas that existing law relating to such matters as homestead, dower, curtesy, statutory allowances payable from a decedent's estate, and the right of a surviving spouse to take against the will of a decedent, do not in all circumstances provide for equal treatment between the sexes, that the constitutionality of such existing law has been drawn into question by decisions of the United States

Supreme Court and the Arkansas Supreme Court, and that there is an urgent need to insure that the law provides equality in the property rights and interest of married persons. Therefore, an

emergency is declared to exist, and this act being necessary for the preservation of the public peace, health and safety, shall take effect and be in force from the date of its approval."

16-47-101. Proof or acknowledgment as prerequisite to recording real estate conveyances.

All deeds and other instruments in writing for the conveyance of any real estate, or by which any real estate may be affected in law or equity, shall be proven or duly acknowledged in conformity with the provisions of this act, before they or any of them shall be admitted to record.

History. Rev. Stat., ch. 31, § 22; C. & M. Dig., § 1525; Pope's Dig., § 1835; A.S.A. 1947, § 49-211.

Publisher's Notes. Rev. Stat., ch. 31, § 22, is also codified as § 18-12-201.

Meaning of "this act". Chapter 31 of the Revised Statutes, codified as §§ 16-

47-101, 16-47-103 — 16-47-106, 16-47-110, 18-12-101, 18-12-102, 18-12-104, 18-12-105, 18-12-201, 18-12-203 — 18-12-206, 18-12-209, 18-12-301, 18-12-402, 18-12-501, 18-12-502, 18-12-601 — 18-12-603.

RESEARCH REFERENCES

UALR L.J. Survey — Property, 12
UALR L.J. 225.

CASE NOTES

ANALYSIS

Defective acknowledgment.
Failure to acknowledge.
—Constructive notice.

Defective Acknowledgment.

Even though an acknowledgment may have been defective, it would not affect the validity of the mortgage as between the makers. *Rogers v. Great Am. Fed. Sav. & Loan Ass'n*, 304 Ark. 143, 801 S.W.2d 36 (1990).

Failure to Acknowledge.

Unacknowledged mortgage is not entitled to record, and, if recorded, its record is of no validity. *Moore v. Ollson*, 105 Ark. 241, 150 S.W. 1028 (1912).

Where neither the offer and acceptance nor the purchaser's agreement was acknowledged, they were not recordable and therefore the purchasers of the realty were without means of giving record notice to the world of their equitable interest in the property. *Sorrells v. Bailey Cattle*

Co., 268 Ark. 800, 595 S.W.2d 950 (Ct. App. 1980).

—Constructive Notice.

A recorded lease which was not acknowledged would not be constructive notice; however, the fact that it was recorded might be considered in determining whether the purchaser had actual notice before purchasing. *Prince v. Alford*, 173 Ark. 633, 293 S.W. 36 (1927).

Recorded contract of senior purchaser of real estate did not constitute constructive notice to junior purchasers where it was not properly acknowledged. *Wyatt v. Miller*, 255 Ark. 304, 500 S.W.2d 590 (1973).

Unacknowledged lease was not valid against purchasers who had no actual knowledge of the lease and could not be charged with constructive notice; accordingly, such lease was properly cancelled. *George v. George*, 267 Ark. 823, 591 S.W.2d 655 (Ct. App. 1979).

Cited: *McGuire v. Bell*, 297 Ark. 282, 761 S.W.2d 904 (1988); *Hawkins v. First*

Nat'l Bank (In re Bearhouse, Inc.), 99
Bankr. 926 (Bankr. W.D. Ark. 1989).

16-47-102. Forms of acknowledgments — Validity — Acknowledgments of married persons.

(a) Either the forms of acknowledgments now in use in this state or any other forms which specify, in the caption or otherwise, the state and county or other place where the acknowledgment is taken, and which set out the name of the person acknowledging and, in instances where he or she acknowledges otherwise than in his or her own right, the name of the person, association, or corporation for which he or she acknowledges, and which recite in substance or the equivalent that the execution of the instrument was acknowledged by the person so named as acknowledging, or any other form of acknowledgment provided by law, may be used in the case of all deeds and other instruments in writing for the conveyance of real or personal property, or whereby such property is to be affected in law or equity, and also in any other case where such acknowledgment is for any purpose required or authorized by law. An acknowledgment in any of these forms shall be sufficient to entitle the instrument to be recorded and to be read in evidence.

(b) The acknowledgment of a married person, both as to the disposition of his or her own property and as to the relinquishment of dower, curtesy, and homestead in the property of a spouse, may be made in the same form as if he or she were sole and without any examination separate and apart from a spouse, and without necessity for a specific reference therein to the interest so conveyed or relinquished.

History. Acts 1937, No. 44, § 1; Pope's Dig., § 1831; Acts 1981, No. 714, § 3; A.S.A. 1947, § 49-201.

Publisher's Notes. Acts 1937, No. 44, § 1, as amended, is also codified as § 18-12-202.

RESEARCH REFERENCES

Ark. L. Rev. Drafting Instruments for Purchase and Conveyancing of Land, 13 Ark. L. Rev. 26.

CASE NOTES

Failure to Acknowledge.

Unacknowledged lease was not valid against purchasers who had no actual knowledge of the lease and could not be charged with constructive notice; accordingly, such lease was properly cancelled.

George v. George, 267 Ark. 823, 591 S.W.2d 655 (Ct. App. 1979).

Cited: Jackson v. Hudspeth, 208 Ark. 55, 184 S.W.2d 906 (1945); Upshaw v. Wilson, 222 Ark. 78, 257 S.W.2d 279 (1953).

16-47-103. Officers authorized to take proof or acknowledgment of real estate conveyances.

(a) The proof or acknowledgment of every deed or instrument of

writing for the conveyance of any real estate shall be taken by one of the following courts or officers:

(1) When acknowledged or proven within this state, before the Supreme Court, the circuit court, the chancery court, or any judges thereof, the clerk of any court of record, any county or probate judge, or before any justice of the peace or notary public;

(2) When acknowledged or proven outside this state, and within the United States or its territories, or in any of the colonies or possessions or dependencies of the United States, before any court of the United States, or any state or territory, or colony or possession or dependency of the United States, having a seal, or a clerk of any such court, or before any notary public, or before the mayor of any incorporated city or town, or the chief officer of any city or town having a seal, or before a commissioner appointed by the Governor of this state;

(3) When acknowledged or proven outside the United States, before any court of any state, kingdom, or empire having a seal; any mayor or chief officer of any city or town having an official seal; or before any officer of any foreign country who by the laws of that country is authorized to take probate of the conveyance of real estate of his own country if the officer has, by law, an official seal.

(b) The acknowledgment of any deed or mortgage, when taken outside the United States, may be taken and certified by a United States consul.

History. Rev. Stat., ch. 31, § 13; Acts 1875, No. 13, § 1, p. 58; 1887, No. 91, § 1, p. 142; 1897, No. 26, § 1, p. 33; 1899, No. 150, § 1, p. 276; C. & M. Dig., § 1516; Acts 1921, No. 233, § 1; 1923, No. 464, §§ 1, 2; Pope's Dig., § 1825; A.S.A. 1947, §§ 49-202, 49-203.

Publisher's Notes. For acts validating prior acknowledgments by certain officers,

see Acts 1873, No. 36, § 2; 1875, No. 13, § 2; 1897, No. 26, § 2; 1899, No. 150, § 2.

Rev. Stat., ch. 31, § 13, as amended, is also codified as § 18-12-203.

Cross References. Commissioners in other states may take acknowledgments, § 25-16-204.

Notaries public may take acknowledgments, § 21-14-106.

CASE NOTES

ANALYSIS

Interested party.

Officer of other state.

Uniform acknowledgment act.

Interested Party.

An acknowledgment taken by an officer who was a party to the deed does not entitle the instrument to record, and a record of it will impart no notice to subsequent purchasers or encumbrancers; however, the defect may be cured by a proper curative statute. *Green v. Abraham*, 43 Ark. 420 (1884).

A notary public is not disqualified to take an acknowledgment to a mortgage by

reason of the fact that he had acted as agent for the mortgagor in obtaining the loan of money which the mortgage was intended to secure. *Penn v. Garvin*, 56 Ark. 511, 20 S.W. 410 (1892).

A surety on a note secured by a mortgage has such an interest therein as will disqualify him from taking the mortgagor's acknowledgment. *Leonhard v. Flood*, 68 Ark. 162, 56 S.W. 781 (1900).

Officer of Other State.

An acknowledgment taken by a justice of the peace or chairman of a county court of another state is invalid. *Worsham v. Freeman*, 34 Ark. 55 (1879).

Uniform Acknowledgment Act.

This section was not superseded by § 16-47-201 et seq., as those sections merely provide an alternative law on the subject of acknowledgments. *Rumph v.*

Lester Land Co., 205 Ark. 1147, 172 S.W.2d 916 (1943).

Cited: *Biscoe v. Byrd*, 15 Ark. 655 (1855).

16-47-104. Attestation of acknowledgments.

(a) In cases of acknowledgment or proof of deeds or conveyances of real estate taken within the United States or territories thereof, when taken before any court or officer having a seal of office, the deed or conveyance shall be attested under the seal of office. If the officer has no seal of office, then it shall be attested under the official signature of the officer.

(b) In all cases of deeds and conveyances proven or acknowledged outside the United States or its territories, the acknowledgment or proof must be attested under the official seal of the court or officer before whom the probate is had.

History. Rev. Stat., ch. 31, §§ 14, 15; C. & M. Dig., §§ 1517, 1518; Pope's Dig., §§ 1826, 1827; A.S.A. 1947, §§ 49-204, 49-205.

Publisher's Notes. Rev. Stat., ch. 31, §§ 14, 15, are also codified as § 18-12-204.

CASE NOTES**Within United States.**

Acknowledgment before a county court of another state must be authenticated by

the seal of the court. *Worsham v. Freeman*, 34 Ark. 55 (1879).

16-47-105. Certificate of acknowledgment.

Every court or officer that shall take the proof or acknowledgment of any deed or conveyance of real estate, or the relinquishment of dower of any married woman in any conveyance of the real estate of her husband, shall grant a certificate thereof and cause the certificate to be endorsed on the deed, instrument, conveyance, or relinquishment of dower, which certificate shall be signed by the clerk of the court where probate is taken in court or by the officer before whom the probate is taken and sealed, if he has a seal of office.

History. Rev. Stat., ch. 31, § 16; C. & M. Dig., § 1519; Pope's Dig., § 1828; A.S.A. 1947, § 49-206.

Publisher's Notes. Rev. Stat., ch. 31, § 16, is also codified as § 18-12-205.

CASE NOTES**ANALYSIS**

Seal.

Signature.

Sufficiency of certificate.

Seal.

When an acknowledgment is taken before an officer having an official seal, it should be authenticated by such seal. *Little v. Dodge*, 32 Ark. 453 (1877).

The absence from a notary's seal of the emblems and devices required by statute does not invalidate his certificate of the acknowledgment of a deed. *Sonfield v. Thompson*, 42 Ark. 46 (1883).

Signature.

An acknowledgment to the execution of a deed of trust is invalid if the notary does not sign his name thereto, although he does affix the imprint of his official seal. *Davis v. Hale*, 114 Ark. 426, 170 S.W. 99 (1914).

Sufficiency of Certificate.

It is not sufficient for the officer to certify in general terms that the deed was proved; it should appear from the certificate that the witness was sworn, and that he stated that the party whose name appears to the deed signed it, or executed it, or acknowledged that he had done so, or some such language amounting to proof of the execution of the deed; and it must appear that such proof was made by one of

the attesting witnesses, unless it is made to appear that the subscribing witnesses are dead or cannot be had. *Trammell v. Thurmond*, 17 Ark. 203 (1856).

The certificate of a clerk of a court of record of another state to the acknowledgment of the execution of a deed is admissible as evidence without attestation of his official character by the judge of the court. *Ferguson v. Peden*, 33 Ark. 150 (1878).

Where there is in fact an appearance and acknowledgment of a deed in some manner, then the official certificate of acknowledgment is conclusive of every fact appearing on its face, and evidence of what passed at the time of the acknowledgment is inadmissible to impeach the certificate, except in case of fraud or imposition in obtaining the acknowledgment, and where knowledge or notice of the fraud or imposition is brought home to the grantee. *Holt v. Moore*, 37 Ark. 145 (1881); *Meyer v. Gossett*, 38 Ark. 377 (1882).

16-47-106. Manner of making acknowledgment — Proof of deed or instrument — Proof of identity of grantor or witness.

(a) The acknowledgment of deeds and instruments of writing for the conveyance of real estate, or whereby such real estate is to be affected in law or equity, shall be by the grantor appearing in person before a court or officer having the authority by law to take the acknowledgment and stating that he had executed the deed or instrument for the consideration and purposes therein mentioned and set forth.

(b) When a deed or instrument referred to in subsection (a) of this section is to be proved, it shall be done by one (1) or more of the subscribing witnesses personally appearing before the proper court or officer and stating on oath that he saw the grantor subscribe the deed or instrument of writing or that the grantor acknowledged in his presence that he had subscribed and executed the deed or instrument for the purposes and consideration therein mentioned, and that he had subscribed the deed or instrument as a witness at the request of the grantor.

(c) If any grantor has not acknowledged the execution of a deed or instrument referred to in subsection (a) of this section, and the subscribing witnesses are dead or cannot be had, then the deed or instrument may be proved by the evidence of the handwriting of the grantor and of at least one (1) of the subscribing witnesses, which evidence shall consist of the deposition of two (2) or more disinterested persons, swearing to each signature.

(d) When any grantor in any deed or instrument that conveys real estate, or whereby any real estate may be affected in law or equity, or

any witness to any like instrument, shall present himself before any court or other officer for the purpose of acknowledging or proving the execution of the deed or instrument, if the grantor or witness shall be personally unknown to the court or officer, his identity and his being the person he purports to be on the face of such instrument of writing shall be proven to the court or officer, which proof may be made by witnesses known to the court or officer, or by the affidavit of the grantor or witness if the court or officer shall be satisfied therewith. The proof or affidavit shall also be endorsed on the deed or instrument of writing.

History. Rev. Stat., ch. 31, §§ 17-20; C. & M. Dig., §§ 1520-1523; Pope's Dig., §§ 1829, 1830, 1832, 1833; A.S.A. 1947, §§ 49-207 — 49-210.

Publisher's Notes. Rev. Stat., ch. 31, §§ 17-20, are also codified as § 18-12-206.

RESEARCH REFERENCES

Ark. L. Rev. The Best Evidence Rule — A Rule Requiring The Production of A Writing to Prove The Writing's Contents, 14 Ark. L. Rev. 153.

Authentication and Identification, 27 Ark. L. Rev. 332.

CASE NOTES

ANALYSIS

Proof of acknowledgment.
Sufficiency of acknowledgment.
Validity of instruments.
Witnessing signature.

Proof of Acknowledgment.

Where there was no substantial evidence that the wife had signed or even knew of either a note or a mortgage which her husband had secured from bank for a loan to pay off his company's debts, the trial court properly denied the foreclosure of the mortgage on the lands belonging to the wife. *Security Bank v. Paul*, 268 Ark. 548, 594 S.W.2d 259 (Ct. App. 1980).

Sufficiency of Acknowledgment.

The acknowledgment must show that the deed was executed "for the consideration and purposes" therein expressed. The words "consideration" and "purposes" are both material, and if either is omitted, and no word of similar import is used, the acknowledgment is insufficient. *Johnson v. Godden*, 33 Ark. 600 (1878); *Ford v. Burks*, 37 Ark. 91 (1881); *Drew County Bank & Trust Co. v. Sorben*, 181 Ark. 943, 28 S.W.2d 730 (1930); *Donham v. Davis*, 208 Ark. 824, 187 S.W.2d 722 (1945).

The word "uses" is not of similar import or substantially the same as the word

"consideration" required by this section. *Martin v. O'Bannon*, 35 Ark. 62 (1879).

An acknowledgment to a mortgage that it was "executed for the consideration and premises hereinafter set forth" sufficiently complied with this section to entitle the mortgage to be recorded. *First Nat. Bank v. Meriwether Sand & Gravel Co.*, 188 Ark. 642, 67 S.W.2d 599 (1934).

A so called "deed within a deed" was not a proper instrument for recordation; the fact that it appeared within an instrument which was duly recorded did not cure the defect of the lack of acknowledgment required by this section. Additionally, title to the interests in question had already vested ownership, and so, although it may have been proper for the chancellor to have received this instrument into evidence, it was clearly error for him to decree that the defective "quitclaim deed" was cured by § 16-47-108. *Andrews v. Heirs of Bellis*, 297 Ark. 3, 759 S.W.2d 532 (1988).

Validity of Instruments.

If the acknowledgment fails to state the consideration, the mortgage, although recorded, is void against subsequent purchasers, even with notice; however, it is good between the parties. *Conner v. Abbott*, 35 Ark. 365 (1880).

The omission of the word “consideration” or words of similar import in the acknowledgment of a mortgage renders the record thereof no notice to third parties. *Atlas Supply Co. v. McAmis*, 185 Ark. 1168, 51 S.W.2d 982 (1932).

Where a deed was not properly acknowledged, this deficiency was not cured by the attempt after the grantor’s death to authenticate the signature; therefore, this instrument was not entitled to the weight given to a properly recorded deed. *Frazier v. Frazier*, 263 Ark. 768, 567 S.W.2d 629 (1978).

Witnessing Signature.

This section requires that two witnesses to a signature on an instrument actually witness the signing of the instrument rather than testify as to the authenticity of the signature. *Frazier v. Frazier*, 263 Ark. 768, 567 S.W.2d 629 (1978).

Cited: *Jackson v. Hudspeth*, 208 Ark. 55, 184 S.W.2d 906 (1945); *Hawkins v. First Nat’l Bank (In re Bearhouse, Inc.)*, 99 Bankr. 926 (Bankr. W.D. Ark. 1989).

16-47-107. Acknowledgment by corporations.

(a) For all deeds, conveyances, deeds of trust, mortgages, and other instruments in writing affecting or purporting to affect the title of any real estate situated in this state and executed by corporations, the form of acknowledgment shall be as follows:

“State of
County of

On this day, 19...., before me,, a Notary Public, (or before any officer within this State or without the State now qualified under existing law to take acknowledgments), duly commissioned, qualified and acting, within and for said County and State, appeared in person the within named and, (being the person or persons authorized by said corporation to execute such instrument, stating their respective capacities in that behalf), to me personally well known, who stated that they were the and of the, a corporation, and were duly authorized in their respective capacities to execute the foregoing instrument for and in the name and behalf of said corporation, and further stated and acknowledged that they had so signed, executed and delivered said foregoing instrument for the consideration, uses and purposes therein mentioned and set forth.

“IN TESTIMONY WHEREOF, I have hereunto set my hand and official seal this day of, 19....

.....
(Notary Public)”

(b) All deeds or instruments affecting or purporting to affect the title to land executed in the above and foregoing form shall be good and sufficient.

History. Acts 1919, No. 45, § 1; C. & M. Dig., § 1526; Pope’s Dig., § 1836; A.S.A. 1947, § 49-212.

Publisher’s Notes. Acts 1919, No. 45, § 1, is also codified as § 18-12-207.

CASE NOTES

Compliance.

A notary's certificate attached to a deed purported to be executed by a corporation, which recited that the president of the corporation had appeared and under oath stated that the seal of the corporation had been affixed to the deed by virtue of a resolution of the directors and had been signed by the president and secretary by

virtue of such resolution, showed an acknowledgment, although a defective one. *Steers v. Kinsey*, 68 Ark. 360, 58 S.W. 1050 (1900).

This section must be substantially complied with, and courts cannot by intentment suggest important words. *Fidelity & Deposit Co. v. Rieff*, 181 Ark. 798, 27 S.W.2d 1008 (1930).

16-47-108. Validation of instruments affecting title to property.

All deeds, conveyances, deeds of trust, mortgages, marriage contracts, and other instruments in writing, affecting or purporting to affect the title to any real estate or personal property situated in this state, which have been recorded and which are defective or ineffectual:

- (1) Because of failure to comply with § 18-12-403; or
- (2) Because the officer who certified the acknowledgment or acknowledgments to such instruments omitted any words required by law to be in the certificate or acknowledgments; or
- (3) Because the officer failed or omitted to attach his seal to such certificate; or
- (4) Because the officer attached to any such certificate a seal not bearing the words and devices required by law; or
- (5) Because the officer was a mayor of a city or an incorporated town in the State of Arkansas and as such was not authorized to certify to executions and acknowledgments to such instruments, or was the deputy of an official duly authorized by law to take acknowledgments but whose deputy was not so authorized; or
- (6) Because the notary public failed to state the date of the expiration of his commission on the certificate of acknowledgment, or incorrectly stated it thereon; or
- (7) Because the officer incorrectly dated the certificate of acknowledgment or failed to state the county wherein the acknowledgment was taken; or
- (8) Because the acknowledgment was certified in any county of the State of Arkansas by any person holding an unexpired commission as notary public under the laws of the state who had, at the time of the certification, ceased to be a resident of the county within and for which he or she was commissioned;

shall be as binding and effectual as though the certificate of acknowledgment or proof of execution was in due form, bore the proper seal, and was certified to by a duly authorized officer.

History. Acts 1955, No. 101, § 1; A.S.A. 1947, § 49-213.

Publisher's Notes. For prior validation acts, see Acts 1873, No. 11, §§ 5, 6, p. 13; Acts 1873, No. 17, §§ 1, 2, p. 25; Acts

1873, No. 41, §§ 1, 2, p. 83; Acts 1883, No. 69, § 6, p. 106; Acts 1883, No. 80, § 1, p. 128; Acts 1885, No. 117, § 1, p. 191; Acts 1893, No. 43, § 1, p. 66; Acts 1893, No. 172, § 1, p. 303; Acts 1895, No. 33, § 1, p.

37; Acts 1897 (Ex. Sess.), No. 21, § 1, p. 58; Acts 1899, No. 56, § 1, p. 107; Acts 1899, No. 175, § 1, p. 313; Acts 1901, No. 41, § 1, p. 79; Acts 1903, No. 87, § 1, p. 150; Acts 1903, No. 87, § 2, p. 150; Acts 1907, No. 147, § 1, p. 354; Acts 1911, No. 24, § 1; Acts 1913, No. 148, § 1; Acts 1915, No. 54, § 1; Acts 1917, No. 142, § 1, p. 765; Acts 1917, No. 142, § 2, p. 765;

Acts 1919, No. 333, § 1; Acts 1919, No. 524, § 1; Acts 1923, No. 80, § 1; Acts 1923, No. 185, § 1; Acts 1935, No. 72, § 1; Acts 1937, No. 352, § 1; Acts 1941, No. 422, § 1; Acts 1949, No. 291, § 1.

Acts 1955, No. 101, § 1, is also codified as § 18-12-208(a).

Cross References. Prior releases validated, § 18-40-108.

RESEARCH REFERENCES

Ark. L. Rev. Validation of Instruments Affecting Title to Property, 9 Ark. L. Rev. 414.

Curative Statutes Affecting Title to Real Property in Arkansas, 12 Ark. L. Rev. 386.

CASE NOTES

ANALYSIS

Applicability.

Acknowledgment by interested party.

Allegation of defect.

Failure to sign.

Homesteads.

Lack of acknowledgment.

Omission of essential words.

Vested rights.

Applicability.

Curative acts, such as Act 101 of 1955 as codified by this section, have retrospective operation and apply to past events and transactions, and do not apply to a transaction that takes place after the passage of the act. *Merchants & Planters Bank & Trust Co. v. Massey*, 302 Ark. 421, 790 S.W.2d 889 (1990).

Acknowledgment by Interested Party.

An acknowledgment taken by an interested party does not authorize it to be recorded and it imparts no notice; however, such acknowledgments taken before Acts 1883, No. 69, were validated by § 6 of that act. *Green v. Abraham*, 43 Ark. 420 (1884) (decision under prior law).

Acts 1893, No. 43, did not cure an acknowledgment which was taken by a party to the deed. *Meunse v. Harper*, 70 Ark. 309, 67 S.W. 869 (1902) (decision under prior law).

Allegation of Defect.

Where complaint merely alleged that acknowledgment of the deed appeared to be defective, such allegation was merely a conclusion and the court was correct in

holding that plaintiff failed to state a cause of action. *Sample v. Sample*, 237 Ark. 178, 372 S.W.2d 609 (1963).

Failure to Sign.

Former curative act did not render valid a certificate of acknowledgment which the notary failed to sign although he affixed the imprint of his seal. *Davis v. Hale*, 114 Ark. 426, 170 S.W. 99 (1914) (decision under prior law).

Homesteads.

A mortgage of a homestead which was invalid because the grantors' wives did not join therein, was cured by former validating act. *Sanders v. Flenniken*, 172 Ark. 454, 289 S.W. 485 (1926) (decision under prior law).

Lack of Acknowledgment.

The curative provisions of this section cannot supply an acknowledgment when in fact there is none. *Pardo v. Creamer*, 228 Ark. 746, 310 S.W.2d 218 (1958).

A so called "deed within a deed" was not a proper instrument for recordation; the fact that it appeared within an instrument which was duly recorded did not cure the defect of the lack of acknowledgment required by § 16-47-106. Additionally, title to the interests in question here had already vested ownership, and so although it may have been proper for the chancellor to have received this instrument into evidence, it was clearly error for him to decree that the defective "quit-claim deed" was cured by this section. *Andrews v. Heirs of Bellis*, 297 Ark. 3, 759 S.W.2d 532 (1988).

Omission of Essential Words.

An acknowledgment valid in the state where made but ineffectual at the time of recordation in Arkansas because of failure to use words required by § 18-12-206 was held to have been cured by former validating acts. *Jackson v. Hudspeth*, 208 Ark. 55, 184 S.W.2d 906 (1945) (decision under prior law).

Vested Rights.

Former acts, curing defective acknowledgments, did not interfere with vested rights. *McGehee v. McKenzie*, 43 Ark. 156 (1884) (decision under prior law).

Cited: *Sample v. Sample*, 237 Ark. 178, 372 S.W.2d 609 (1963).

16-47-109. Validation of acknowledgments of personnel of armed forces.

All acknowledgments taken before March 20, 1945, and subscribed by officers of the United States armed forces acknowledging the signatures of soldiers in the armed forces are validated in every respect.

History. Acts 1945, No. 263, § 1; A.S.A. 1947, § 49-214.

16-47-110. Recorded deed or written instrument affecting real estate.

(a) Every deed or instrument in writing which conveys or affects real estate and which is acknowledged or proved and certified as prescribed by this act may, together with the certificate of acknowledgment, proof, or relinquishment of dower, be recorded by the recorder of the county where such land to be conveyed or affected thereby is located, and when so recorded may be read in evidence in any court in this state without further proof of execution.

(b) If it appears at any time that any deed or instrument duly acknowledged or proved and recorded as prescribed by this act is lost or not within the power and control of the party wishing to use the deed or instrument, the record thereof or a transcript of the record certified by the recorder may be read in evidence without further proof of execution.

(c) Neither the certificate of acknowledgment nor the probate of any such deed or instrument, nor the record or transcript thereof, shall be conclusive, but it may be rebutted.

History. Rev. Stat., ch. 31, §§ 26-28; C. & M. Dig., §§ 1530-1532; Pope's Dig., §§ 1840-1842; A.S.A. 1947, §§ 28-919 — 28-921.

Publisher's Notes. Rev. Stat., ch. 31, §§ 26-28, are also codified as § 18-12-209.

Meaning of "this act". Chapter 31 of the Revised Statutes, codified as §§ 16-

47-101, 16-47-103 — 16-47-106, 16-47-110, 18-12-101, 18-12-102, 18-12-104, 18-12-105, 18-12-201, 18-12-203 — 18-12-206, 18-12-209, 18-12-301, 18-12-402, 18-12-501, 18-12-502, 18-12-601 — 18-12-603.

Cross References. Admissibility of deeds, § 18-12-605.

RESEARCH REFERENCES

Ark. L. Rev. Documentary Evidence — Arkansas, 15 Ark. L. Rev. 79.

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ANALYSIS

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In General.

The acknowledgment of the execution of a deed of conveyance, as required by statute, does not alone authorize its introduction as evidence; it must also be filed and recorded or its execution proved at the trial. *Wilson & Wife v. Spring*, 38 Ark. 181 (1881); *Watson v. Billings*, 38 Ark. 278 (1881); *Dorr v. School Dist. No. 26*, 40 Ark. 237 (1882).

Burden of Proof.

The burden of proof rests upon the person denying that he signed a deed or acknowledged it, to show the falsity of the certificate, which carries the presumption that the officer making it has certified to the truth. *Polk v. Brown*, 117 Ark. 321, 174 S.W. 562 (1915); *Nevada County Bank v. Gee*, 130 Ark. 312, 197 S.W. 680 (1917).

The burden of disproving the authenticity of the acknowledgment of a deed before a notary public is on the moving party in order to have the recorded deed declared void for forgery. *Lytton v. Johnson*, 236 Ark. 277, 365 S.W.2d 461 (1963).

Certificate.

The only showing upon which a deed can be admitted to evidence is the certificate of acknowledgment by the proper officer. *Simpson v. Montgomery*, 25 Ark. 365 (1869).

While it is competent for the maker of a deed to prove that there was no appearance before an officer to acknowledge its execution, and no acknowledgment in fact, yet if he did acknowledge it in some manner, the officer's certificate is conclusive as to the terms of the acknowledged

ment. *Petty v. Grisard*, 45 Ark. 117 (1885); *Steers v. Kinsey*, 68 Ark. 360, 58 S.W. 1050 (1900).

If a plaintiff in ejectment is not able to introduce an original deed in evidence, a purported copy from the record is not admissible unless certified by the recorder. *Robert v. Brown*, 157 Ark. 230, 247 S.W. 1058 (1923).

Parol Evidence.

Parol evidence that a deed has been executed, but not recorded, and lost, is sufficient to admit secondary evidence of its contents. *Calloway v. Cossart*, 45 Ark. 81 (1885); *Crawford v. McDonald*, 84 Ark. 415, 106 S.W. 206 (1907).

Parol evidence is admissible to prove true date of an acknowledgment. *Merrill v. Sybert*, 65 Ark. 51, 44 S.W. 462 (1898).

Prima Facie Evidence.

A recorded and properly acknowledged mortgage makes prima facie case thereon. *Straughan v. Bennett*, 153 Ark. 254, 240 S.W. 30 (1922).

Proof of Execution.

A certified copy of a recorded conveyance is admissible in evidence without proof of the execution. *Apel v. Kelsey*, 47 Ark. 413, 2 S.W. 102 (1886); *Sibley v. England*, 90 Ark. 420, 119 S.W. 820 (1909).

An unrecorded mortgage is inadmissible in evidence without proof of its execution. *Gardner v. Hughes*, 136 Ark. 332, 206 S.W. 678 (1918).

Record.

In a prosecution for forgery, it was not improper to permit the introduction of the record of certain deed, in the chain of title to the land, concerning which it was alleged that forged deed had been uttered by the defendant, without proof that the original deeds were either lost or destroyed. *Temple v. State*, 126 Ark. 290, 189 S.W. 855 (1916), overruled on other grounds, *Nail v. State*, 231 Ark. 70, 328 S.W.2d 836 (1959).

SUBCHAPTER 2 — UNIFORM ACKNOWLEDGMENT ACT

SECTION.

16-47-201. Acknowledgment of instruments.

SECTION.

16-47-202. Officials authorized to take within the state.

SECTION.

- 16-47-203. Officials authorized to take within the United States.
- 16-47-204. Officials authorized to take without the United States.
- 16-47-205. Proof of identity of person making.
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Effective Dates. Acts 1943, No. 169, § 15: approved Mar. 4, 1943. Emergency clause provided: "That because many persons of this State are now in the armed forces of the United States and are now located in the various States of the United States, as well as in many foreign countries, and are unable to comply with the technical requirements of the Arkansas laws as to acknowledgments, an emergency is declared to exist and this act shall be in full force and effect from and after its passage."

Acts 1971, No. 352, § 2: Mar. 22, 1971. Emergency clause provided: "It is hereby found and determined by the General As-

sembly that among the multitude of real estate transactions and other transactions requiring acknowledgments, there are undoubtedly some which have not strictly complied with the present law; that such transactions raise clouds on title and create other difficulties in land transfers; and that only by the immediate passage of this Act can this situation be remedied. Therefore, an emergency is hereby declared to exist and this Act being necessary for the immediate preservation of the public peace, health and safety shall become effective from and after its passage and approval."

RESEARCH REFERENCES

Ark. L. Rev. Drafting Instruments for Purchase and Conveyancing of Land, 13 Ark. L. Rev. 26.

Authentication and Identification, 27 Ark. L. Rev. 332.

16-47-201. Acknowledgment of instruments.

Any instrument may be acknowledged in the manner and form provided by the laws of this state, or as provided by this act.

History. Acts 1943, No. 169, § 1; A.S.A. 1947, § 49-101.

Meaning of "this act". Acts 1943, No.

169, codified as §§ 16-47-201 — 16-47-210, 16-47-213 — 16-47-216.

CASE NOTES

Alternative System.

Acts 1943, No. 169 did not repeal, modify or in any way impair any law of this state; it provides only an alternative system for acknowledgments. *Rumph v.*

Lester Land Co., 205 Ark. 1147, 172 S.W.2d 916 (1943).

Cited: *Jackson v. Hudspeth*, 208 Ark. 55, 184 S.W.2d 906 (1945).

16-47-202. Officials authorized to take within the state.

The acknowledgment of any instrument may be made in this state before:

- (1) A judge of a court of record or before any former judge of a court of record who served at least four (4) or more years;
- (2) A clerk of any court of record;
- (3) A commissioner or registrar or recorder of deeds;
- (4) A notary public;
- (5) A justice of the peace; or
- (6) A master in chancery or registrar in chancery.

History. Acts 1943, No. 169, § 2; 1983, No. 850, § 3; A.S.A. 1947, § 49-102.

16-47-203. Officials authorized to take within the United States.

The acknowledgment of any instrument may be without the state but within the United States or a territory or insular possession of the United States and within the jurisdiction of the officer, before:

- (1) A clerk or deputy clerk of any federal court;
- (2) A clerk or deputy clerk of any court of record of any state or other jurisdiction;
- (3) A notary public;
- (4) A commissioner of deeds;
- (5) Any person authorized by the laws of such other jurisdiction to take acknowledgments.

History. Acts 1943, No. 169, § 3; 1957, No. 411, § 1; A.S.A. 1947, § 49-103.

16-47-204. Officials authorized to take without the United States.

The acknowledgment of any instrument may be made without the United States before:

- (1) An ambassador, minister, charge d'affaires, counselor to or secretary of a legation, consul general, consul, vice-consul, commercial attache, or consular agent of the United States accredited to the country where the acknowledgment is made.
- (2) A notary public of the country where the acknowledgment is made.
- (3) A judge or clerk of a court of record of the country where the acknowledgment is made.

History. Acts 1943, No. 169, § 4;
A.S.A. 1947, § 49-104.

16-47-205. Proof of identity of person making.

The officer taking the acknowledgment shall know or have satisfactory evidence that the person making the acknowledgment is the person described in and who executed the instrument.

History. Acts 1943, No. 169, § 5;
A.S.A. 1947, § 49-105.

16-47-206. Acknowledgment by a married woman.

An acknowledgment by a married woman may be made in the same form as though she were unmarried.

History. Acts 1943, No. 169, § 6;
A.S.A. 1947, § 49-106.

16-47-207. Forms of certificates.

An officer taking the acknowledgment shall endorse thereon or attach thereto a certificate substantially in one (1) of the following forms:

(1) By Individuals:

“State of
County of

On this the day of, 19...., before me,, the undersigned officer, personally appeared, known to me (or satisfactorily proven) to be the person whose name subscribed to the within instrument and acknowledged that he executed the same for the purposes therein contained.

In witness whereof I hereunto set my hand and official seal.

.....
.....
Title of Officer.”

(2) By a Corporation:

“State of
County of

On this the day of, 19...., before me, the undersigned officer, personally appeared, who acknowledged himself to be the of, a corporation, and that he, as such, being authorized so to do, executed the foregoing instrument for the purposes therein contained, by signing the name of

the corporation by himself as

In witness whereof I hereunto set my hand and official seal.

.....
.....
Title of Officer.”

(3) By an Attorney in Fact:

“State of
County of

On this theday of, 19...., before me,, the undersigned officer, personally appeared, known to me (or satisfactorily proven) to be the person whose name is subscribed as attorney in fact for, and acknowledged that he executed the same as the act of his principal for the purposes therein contained.

In witness whereof I hereunto set my hand and official seal.

.....
.....
Title of Officer.”

(4) By Any Public Officer or Deputy Thereof, or by Any Trustee, Administrator, Guardian, or Executor:

“State of
County of

On this the day of, 19...., before me,, the undersigned officer, personally appeared, of the State (County or City as the case may be) of, known to me (or satisfactorily proven) to be the person described in the foregoing instrument, and acknowledged that he executed the same in the capacity therein stated and for the purposes therein contained.

In witness whereof I hereunto set my hand and official seal.

.....
.....
Title of Officer.”

History. Acts 1943, No. 169, § 7;
A.S.A. 1947, § 49-107.

16-47-208. Execution of certificate by officer.

The certificate of the acknowledging officer shall be completed by his signature, his official seal if he has one, the title of his office, and if he is a notary public, the date his commission expires.

History. Acts 1943, No. 169, § 8;
A.S.A. 1947, § 49-108.

16-47-209. Authentication of acknowledgments.

(a) If the acknowledgment is taken within this state or is made without this state but in the United States by one (1) of the officers designated in § 16-47-203, or without the United States by an officer of the United States, no authentication shall be necessary.

(b) If the acknowledgment is made without the United States and by a notary public or a judge or clerk of a court of record of the country where the acknowledgment is made, the certificate shall be authenticated by a certificate under the great seal of state of the country, affixed by the custodian of such seal, or by a certificate of a diplomatic, consular, or commercial officer of the United States accredited to that country, certifying as to the official character of such officer.

History. Acts 1943, No. 169, § 9; 1957, No. 411, § 2; 1971, No. 365, § 1; A.S.A. 1947, § 49-109.

CASE NOTES**Outside State.**

Acknowledgment of a deed by a sister state's notary public having a seal, but without certificate by a clerk of a court of record in the county where taken showing

the official character of the notary who took the acknowledgment, was entitled to record because valid under § 16-47-103. *Rumph v. Lester Land Co.*, 205 Ark. 1147, 172 S.W.2d 916 (1943).

16-47-210. Acknowledgments under laws of other states.

Notwithstanding any provision in this act contained, the acknowledgment of any instrument without this state in compliance with the manner and form prescribed by the laws of the place of its execution, if in a state, a territory or insular possession of the United States, or in the District of Columbia, or in the Philippine Islands, verified by the official seal of the officer before whom it is acknowledged, shall have the same effect as an acknowledgment in the manner and form prescribed by the laws of this state for instruments executed within the state.

History. Acts 1943, No. 169, § 10; 1971, No. 365, § 2; A.S.A. 1947, § 49-110. **Meaning of "this act".** See note to § 16-47-201.

16-47-211. Validation of unauthenticated writings affecting title to property.

All deeds, conveyances, deeds of trust, mortgages, mineral leases, marriage contracts, and other instruments in writing, affecting or purporting to affect title to any real estate or personal property situated in this state, which have been recorded or executed prior to July 19, 1971, and which may be defective or ineffectual because of the failure to have the authentication formerly required by Acts 1943, No. 169, §§ 9 and 10, prior to these amendments, shall be binding and effectual as though such instruments contained the required authentication.

History. Acts 1971, No. 365, § 3; A.S.A. 1947, § 49-110.1.

Publisher's Notes. Acts 1943, No. 169, §§ 9 and 10, referred to in this section, are codified as §§ 16-47-209, 16-47-210.

The words "these amendments" refer to Acts 1971, No. 365, which amended §§ 16-47-209 and 16-47-210 and enacted §§ 16-47-211 and 16-47-212.

16-47-212. Act cumulative.

This act shall be cumulative to other acts of the General Assembly relating to acknowledgments.

History. Acts 1971, No. 365, § 4; A.S.A. 1947, § 49-110.2.

Meaning of "this act". Acts 1971, No.

365, codified as §§ 16-47-209 — 16-47-212.

16-47-213. Acknowledgments by persons serving in or with the armed forces of the United States within or without the United States.

In addition to the acknowledgment of instruments in the manner and form and as otherwise authorized by this act, persons serving in or with the armed forces of the United States or their dependents may acknowledge the same wherever located before any commissioned officer in active service of the armed forces of the United States with the rank of second lieutenant or higher in the Army, Air Force or Marine Corps, or ensign or higher in the Navy or United States Coast Guard. The instrument shall not be rendered invalid by the failure to state therein the place of execution or acknowledgment. No authentication of the officer's certificate of acknowledgment shall be required but the officer taking the acknowledgment shall endorse thereon or attach thereto a certificate substantially in the following form:

"On this day of , 19 ..., before me,, the undersigned officer, personally appeared (Serial No.) known to me or satisfactorily proven to be (serving in or with the armed forces of the United States) (a dependent of, (Serial No.) a person serving in or with the armed forces of the United States) and to be the person whose name is subscribed to the within instrument and acknowledged that he executed the same for the purposes therein contained. And the undersigned does further certify that he is at the date of this certificate a commissioned officer of the rank stated below and is in the active service of the armed forces of the United States.

.....

Signature of the Officer

.....

Rank and Serial No. of Officer
and Command to which attached."

History. Acts 1943, No. 169, § 11; 1961, No. 16, § 1; A.S.A. 1947, § 49-111.

Publisher's Notes. Acts 1961, No. 16,

§ 2, provided that the act did not repeal or alter laws regarding acknowledgment of instruments which were in effect prior to

enactment of the Uniform Acknowledgment Act and which provide an alternative method of acknowledging instruments.

Meaning of "this act". See note to § 16-47-201.

16-47-214. Acknowledgments previously taken unaffected.

No acknowledgment heretofore taken shall be affected by anything contained in this act.

History. Acts 1943, No. 169, § 12; A.S.A. 1947, § 49-112.

Meaning of "this act". See note to § 16-47-201.

CASE NOTES

Cited: Jackson v. Hudspeth, 208 Ark. 55, 184 S.W.2d 906 (1945).

16-47-215. Uniformity of interpretation.

This act shall be so interpreted as to make uniform the laws of those states which enact it.

History. Acts 1943, No. 169, § 13; A.S.A. 1947, § 49-113.

Meaning of "this act". See note to § 16-47-201.

16-47-216. Title of act.

This act may be cited as the "Uniform Acknowledgment Act".

History. Acts 1943, No. 169, § 14; A.S.A. 1947, § 49-114.

Meaning of "this act". See note to § 16-47-201.

16-47-217. Validation of prior acknowledgments — Construction of uniform act.

It is the intent and purpose of this section that all acknowledgments taken subsequent to Acts 1957, No. 411 either in accordance with the Uniform Acknowledgment Act or in accordance with the laws of this state in effect at the time of adoption of the Uniform Acknowledgment Act be cured and validated for all purposes; and that neither Acts 1957, No. 411 nor the Uniform Acknowledgment Act to which it is amendatory shall be construed to repeal or modify any laws relative to the taking of acknowledgments and the authentication thereof which were in effect in this state at the time of adoption of the Uniform Acknowledgment Act, but that the Uniform Acknowledgment Act shall be deemed to provide an alternative system for taking and authenticating acknowledgments.

History. Acts 1959, No. 127, § 2; A.S.A. 1947, § 49-115.

Publisher's Notes. Acts 1957, No. 411, referred to in this section, is codified as §§ 16-47-203 and 16-47-209. The Uniform

Acknowledgment Act is codified as §§ 16-47-201 — 16-47-210 and 16-47-213 — 16-47-216.

Acts 1959, No. 127, § 1, validated acknowledgments taken subsequent to the

effective date of Acts 1957, No. 411, in accordance with the Uniform Acknowledgment Act or in accordance with state law at the time of adoption of the uniform act.

16-47-218. Validation of acknowledgments — Construction of acts.

All acknowledgments taken subsequent to Acts 1959, No. 127 either in accordance with the Uniform Acknowledgment Act or in accordance with the laws of this state in effect at the time of adoption of the Uniform Acknowledgment Act are cured and validated for all purposes; and neither Acts 1959, No. 127 nor the Uniform Acknowledgment Act shall be construed to repeal or modify any laws relative to the taking of acknowledgments and the authentication thereof which were in effect in this state at the time of adoption of the Uniform Acknowledgment Act, but that the Uniform Acknowledgment Act shall be deemed to provide an alternative system for taking and authenticating acknowledgments.

History. Acts 1971, No. 352, § 1; A.S.A. § 16-47-217. The Uniform Acknowledgment Act is codified as §§ 16-47-201 — 1947, § 49-115.1.

Publisher's Notes. Acts 1959, No. 127, 16-47-210 and 16-47-213 — 16-47-216. referred to in this section, is codified as

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